TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,
PETITIONER,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS AND JOE THOMAS

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF COOK COUNTY, STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED MAY 11, 1931

CERTIORARI GRANTED OCTOBER 12, 1931

(35,881)

( )

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INDEX

	Original	Print
Record from circuit court of Cook County	1	1
Caption (omitted in printing)	1	
Praecipe under Workmen's Compensation Act	3	1
Writ of scire facias	5	2
Writ of certiorari	7	3
Certificate as to notice	9	4
Exhibit "A"—Notice	10	4
Exhibit "B"—Notice	11	5
Bond on certiorari (omitted in printing)	13	
Appearance of counsel (omitted in printing)	15	
Proceedings before Industrial Commission	17	7
Application for adjustment of claim	19	7
Notice of filing of claim	21	9
Notice of hearing	23	11
Statement of evidence before arbitrator	25	12
Caption	25	12
Stipulation as to facts	26	12

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	Original	Print
Testimony of Joe Thomas	27	13
B. S. Tottinville	63	37
H. W. Slaughter	91	55
Dr. William H. Bohart	97	59
Report of medical director	100	61
Decision of arbitrator	104	62
Notice of decision	105	63
Receipt for decision of arbitrator	108	64
Petition for review of decision of arbitrator	110	65
Motion for order extending time	112	66
Notices of hearing on review	114	67
Statement of proceedings on review	118	68
Decision on review	121	69
Receipt for decision on review	124	71
Motion for order extending time	126	71
Writ of certiorari	128	72
Secretary's certificate (omitted in printing)	129	
Judgment	131	73
Order denying writ of error, supreme court	133	74
Order staying proceedings	135	75
Clerk's certificate (omitted in printing)	136	
Assignments of error	138	75
Order allowing certiorari		77

[fols. a & 1 & 2] [Caption omitted]

[fols. 3 & 4]

IN CIRCUIT COURT OF COOK COUNTY

General Number B-203,860

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent, and INDUSTRIAL COMMISSION OF ILLINOIS

PRÆCIPE UNDER WORKMEN'S COMPENSATION ACT—Filed July 28, 1930

The Clerk of said Court will issue a writ of certiorari in accordance with the provisions of the Workmen's Compensation Act, to the Industrial Commission of Illinois, directing said Commission to certify to this Court a transcript of the decision, award and other proceedings, rendered on the 8th day of July, A. D. 1930, for the sum of $18.00 per week for a period of 27 2/7 weeks, and $18.00 per week for a period of 94 1/12 weeks in the above entitled cause on or before the third Monday of August A. D. 1930, and the Clerk of the said Court will also issue a writ of scire facias in said cause to the aforesaid petitioner or applicant and make it returnable to the — Term of said Court, A. D. 1930.

Mail notice to:

Joe Thomas, 1614 Fifth Ave., Chicago Heights, Illinois.

J. W. Horwitz, Atty. for Joe Thomas, 10 So. La Salle St. Chicago, Illinois.

B. E. Cohen, Atty. for Joe Thomas, 10 So. La Salle St. Chicago, Illinois.

Industrial Commission of Illinois, 205 W. Wacker Drive, Chicago, Illinois.

Edward W. Rawlins, Attorney for Chicago & Eastern Illinois R. R. Co.

To Thomas O. Wallace, Clerk.

Chicago, July 28th, A. D. 1930.

Compared.

[File endorsement omitted.]

[fols. 5 & 6] IN CIRCUIT COURT OF COOK COUNTY

SCIRE FACIAS UNDER WORKMEN'S COMPENSATION ACT—Filed July 28, 1930

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

Whereas, at a session of the Industrial Commission, held in the County of Cook and State of Illinois, to-wit: on the 8th day of July A. D. 1930, before the said Industrial Commission then sitting in the City of Chicago, in said County, a decision or award was rendered by said Commission in a certain action or proceeding then pending before said Industrial Commission against Chicago & Eastern Illinois R. R. Co. and in favor of Joe Thomas, we do therefore hereby command you that you summon the said Joe Thomas if he shall be found in your County, personally to be and appear before the said Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in the City of Chicago, in said Cook County, on the third Monday of August A. D. 1930, then and there to show cause, if any he have or can show, why the said decision or award should not be reversed and set aside; and further to do and receive what shall then and there be adjudged by our said Court in the premises.

And have you then and there this Writ, with your return thereon in what manner you shall have executed the same.

Witness, Thomas O. Wallace, Clerk of our said Court, and the Seal thereof, at Chicago, in said County, this 28th day of July, A. D. 1930.

Thomas O. Wallace, Clerk. (Seal.)

Compared.

[File endorsement omitted.]

[fol. 7] IN CIRCUIT COURT OF COOK COUNTY

WRIT OF CERTIORARI UNDER WORKMEN'S COMPENSATION ACT—Filed July 28, 1930

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to Industrial Commission, Greeting:

Whereas, it has been represented to our Circuit Court of Cook County, by the Præcipe or Petition of Chicago & Eastern Illinois R. R. Co., filed in said Court, that on the 8th day of July, A. D. 1930, in a certain suit or proceeding, then pending before you, a decision or award has been rendered by you in favor of Joe Thomas and against said Chicago & Eastern Illinois R. R. Co. for $18.00 per week for a period of 27 2/7 weeks, and $18.00 per week for a period of 94 1/12 weeks;

And the said Chicago & Eastern Illinois R. R. Co. having filed a Præcipe or Petition for a Writ of Certiorari and we being willing that said cause should be brought before our said Circuit Court;

Do therefore command you that, without delay, you certify to our said Circuit Court of Cook County, a transcript of the decision or award and other proceedings had before you in said cause on or before the third Monday of August, A. D. 1930.

To the Sheriff of Said County, to execute and return in due form of law.

Witness, Thomas O. Wallace, Clerk of our said Circuit Court of Cook County, and the Seal of said Court, at Chicago, this 28th day of July, A. D. 1930.

Thomas O. Wallace, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 8] And thereupon, on the same day, to-wit, on the 28th day of July, A. D. 1930, a certain Certificate of Mail-

ing Notice was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

[fol. 9] IN CIRCUIT COURT OF COOK COUNTY

[Title omitted]

CERTIFICATE OF MAILING NOTICE—Filed July 28, 1930

I, Thomas O. Wallace, Clerk of the Circuit Court of Cook County, in and for said County, in the State of Illinois, do hereby certify that on the 28th day of July, A. D. 1930, I sent by mail, postage prepaid, a Notice, a copy of which is hereto attached, marked "Exhibit A," to the following defendants, and addressed as follows:

One Copy Ex. A to Joe Thomas, 1614 Fifth Avenue, Chicago Heights, Illinois.

One Copy Ex. A. to J. W. Horwitz, 10 So. La Salle St., Chicago, Illinois, Attorney for Joe Thomas.

One Copy Ex. A to E. E. Cohen, 10 So. La Salle St., Chicago, Illinois, Attorney for Joe Thomas.

One Copy Ex. B to Industrial Commission of Illinois, 205 W. Wacker Drive, Chicago, Ill.

Thomas O. Wallace, Clerk.

Exhibit "A."

Compared.

[Endorsed:] No. B-203,860. Circuit Court of Cook County. Joe Thomas vs. Chicago & Eastern Illinois R. R. Co. Certificate of Mailing Notice. Registered Jul. 29, 1930. Thomas O. Wallace, Clerk Circuit Court, Deputy I. Filed 1930, Jul. 28, A. M. 11:40. Thomas O. Wallace, Clerk, per —— ——. Edward W. Rawlins, Attorney for Defendant, 105 S. La Salle St. Central 8295.

[fol. 10] EXHIBIT "A"

Scire Facias under Workmen's Compensation Act

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

Whereas, at a session of the Industrial Commission, held in the County of Cook and State of Illinois, to-wit: on the

8th day of July, A. D. 1930, before the said Industrial Commission then sitting in the City of Chicago, in said County, a decision or award was rendered by said Commission in a certain action or proceeding then pending before said Industrial Commission against Chicago & Eastern Illinois R. R. Co. and in favor of Joe Thomas, we do therefore hereby command you that you summon the said Joe Thomas, if he shall be found in your County, personally to be and appear before the said Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in the City of Chicago, in the said Cook County, on the third Monday of August, A. D. 1930, then and there to show cause, if any he have or can show, why the said decision or award should not be reversed and set aside; and further to do and receive what shall then and there be adjudged by our said ourt in the premises.

And have you then and there this Writ, with your return thereon in what manner you shall have executed the same.

Witness Thomas O. Wallace, Clerk of our said Court, and the Seal thereof, at Chicago, in said County, this 28th day of July, A. D. 1930.

Thomas O. Wallace, Clerk. (Seal.)

Compared.

[Endorsed:] Klarkowski. B-203,860. Circuit Court of Cook County, —— Term, A. D. 19—. Joe Thomas vs. Industrial Commission of Illinois and Chicago & Eastern Illinois R. R. Co. Scire facias under Workmen's Compensation Act. Filed 1930, July 28, A. M. 11:36. Thomas O. Wallace, per V. Registered July 28, 1930. Thomas O. Wallace, Clerk Circuit Court. Edward W. Rawlins, Attorney, 105 So. La Salle St. Central 8295.

[fols. 11 & 12] EXHIBIT "B"

Writ of Certiorari under Workmen's Compensation Act

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to Industrial Commission, Greeting:

Whereas, it has been represented to our Circuit Court of Cook County, by the Præcipe or Petition of Chicago & East-

ern Illinois R. R. Co., filed in said Court, that on the 8th day of July, A. D. 1930, in a certain suit or proceeding, then pending before you, a decision or award has been rendered by you in favor of Joe Thomas and against said Chicago & Eastern Illinois R. R. Co. for $18.00 per week for a period of 27 2/7 weeks and $18.00 per week for a period of 94 1/12 weeks;

And the said Chicago & Eastern Illinois R. R. Co. having filed a Præcipe or Petition for a Writ of Certiorari, and we being willing that said cause should be brought before our said Circuit Court;

Do therefore command you that, without delay, you certify to our said Circuit Court of Cook County, a transcript of the decision or award and other proceedings had before you in said cause on or before the third Monday of August, A. D. 1930.

To the Sheriff of said County to execute and return in due form of law.

Witness, Thomas O. Wallace, Clerk of our said Circuit Court of Cook County, and the Seal of said Court, at Chicago, this 28th day of July, A. D. 1930.

Thomas O. Wallace, Clerk.

Compared.

[Endorsed:] Klarkowski. B-203,860. Circuit Court of Cook County, —— Term, A. D. 192-. Joe Thomas vs. Industrial Commission and Chicago & Eastern Illinois R. R. Co. Writ of Certiorari. Filed 1930, July 28, a. m. 11:36. Thomas O. Wallace, per V. Registered July 28, 1930. Thomas O. Wallace, Clerk Circuit Court. Edward W. Rawlins, Attorney for Plaintiff, 105 So. La Salle St., Central 8295; Attorney for the Chicago & Eastern Illinois R. R. Co.

[fols. 13 & 14] Bond on certiorari for $2,400, approved and filed July 28, 1930, omitted in printing.

[fols. 15 & 16] Appearance of counsel, filed August 18, 1930, omitted in printing.

[fol. 17] IN CIRCUIT COURT OF COOK COUNTY

Industrial Commission, 158,174. Circuit Court, #B203,860

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent and Petitioner,

vs.

JOE THOMAS, Applicant, and INDUSTRIAL COMMISSION OF Illinois, Peter Grieve, Jr., Clarence S. Piggott, H. H. Willoughby, C. A. Pense, and Charles F. Wills, Members of said Commission, and Walter F. Rohm, Secretary, Defendants

[File endorsement omitted.]

Compared.

[fols. 18 & 18a] **Proceedings Before Industrial Commission**—Filed Oct. 23, 1930

RETURN TO WRIT OF CERTIORARI

The Industrial Commission of Illinois, Peter Grieve, Jr., Clarence S. Piggott, H. H. Willoughby, C. A. Pense, and Charles F. Wills, members of said Commission, in response and obedience to the Writ of Certiorari in this cause issued commanding them to certify to said Court a transcript of the d-cision and award of the Arbitrator and a transcript of all other proceedings had before them in said cause, do make return thereto and say that the following and no other proceedings were had in said cause:

[fols. 19 & 20] [File endorsement omitted]

STATE OF ILLINOIS:

Industrial Commission, 205 W. Wacker Drive, Chicago, Ill.

APPLICATION FOR ADJUSTMENT OF CLAIM—Filed Jan. 18, 1930

Notice of Disputed Claim and Memorandum of Names and Addresses

(This form to be filed in duplicate)

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

The petition of the undersigned respectfully shows to this Honorable Commission the following, to-wit:

1. That on the 15th day of July, 1929, (Name of person injured) Joe Thomas was injured by reason of an accident arising out of and in the course of his employment by the above named (Name of Employer) Chicago & Eastern Illinois R. R. Co.; that your petitioner is the person injured.

2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:

(a) The employer denies liability for the compensation provided for in the Workmen's Compensation Act.

(b) A dispute exists concerning the amount and duration of the compensation payable.

3. The following particulars relative to this application are herewith given:

(a) Name of injured employee: Joe Thomas. Address: 1614–5th Ave., Chicago Heights.

(b) Name of employer: Chicago & Eastern Illinois R. R. Co. Place of business and address: 332 So. Michigan Ave.

(c) Place of accident: In Roundhouse.

(d) Nature of work upon which injured was engaged at time of accident and how caused: Caught right hand in gear machine, amputating fingers and involving hand.

(e) State whether medical, surgical and hospital treatment were furnished by employer and, if so, to what extent; amount expended for above purposes and period treated. Yes.

(f) Earnings of employee during year preceding injury, If employed by the same employer; if not so employed give earnings of such employees in the same class or grade. 45¢ per hour.

(g) Compensation payments received from employer: $—— account medical care and attendance; $—— per week for —— weeks' temporary total disability; $—— per week for —— weeks' partial disability; $—— account of other items, here enumerated, ——.

4. Additional amount claimed as compensation: (a) $—— account medical care and attendance; (b) $—— per

week for —— weeks' temporary total disability; (c) $—— for serious and permanent disfigurement to ——; (d) $—— per week for —— weeks' partial disability; (e) $18.00 per week for 170 weeks' loss or loss of use of right hand under paragraph (e) of section 8.

(f) $—— per week for complete and permanent disability, including pension provided for under paragraph (f) of section 8.

5. (a) Date of service on employer of notice of accident: Same day. (b) If notice not served within thirty days, did any agent of employer have knowledge of the facts and circumstances of the accident? ——.

6. Age of petitioner at the time of the injury: 50. Give names, ages and addresses of all children under the age of sixteen years at the time of the injury. ~~Name: Frost.~~ Address: ——. ~~Age: 12.~~ Name: Doc. Address: ——. Age: 10. Name: Julia Emma. Address: ——. Age: 8.

7. Your petitioner prays that the Industrial Commission appoint an arbitrator to make such inquiries and investigations as he shall deem necessary, and that a day be appointed by said Industrial Commission and the time and place thereof fixed, where said arbitrator may hear such proper evidence as the parties hereto may submit, and that an award and decision may be made, in conformity with the statute in such case made and provided.

The undersigned requests that all notices of proceedings in the above entitled matter be served personally or by registered mail upon the party whose name and address follows as attorney for petitioner; if no attorney's name appears, then to the name and address of the undersigned.

Dated this 17th day of January, 1930.

(Signed by mark) Joe (X his mark) Thomas, Address: 1614 5th Avenue, Chicago Heights. J. W. Horwitz, Attorney for Petitioner, Address: 10 S. LaSalle Street.

——

[fols. 21 & 22] To employer:

If you carry insurance covering this accident, forward all these papers to your insurance company at once.

Form 77

NOTICE OF FILING OF CLAIM—Jan. 27, 1930

Before the Industrial Commission of Illinois, 205 W. Wacker Drive, Chicago, Ill.

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

To Res., thru A. R. Swanson, 724-332 So. Michigan Ave., Chicago, Ill.:

You are hereby notified that application for adjustment of claim in the above entitled matter was filed with said Commission on the 18th day of January, 1930; that paragraph (a) of Section 19 of the Workmen's Compensation Act (as amended) provides that "if the compensation claimed is for a partial permanent or total permanent incapacity or for death," you may elect to have said matter determined by a Committee of Arbitration by filing with said Commission your "election in writing within five days" of the receipt of this notice and by depositing with said Commission with said election the sum of twenty dollars to be paid by said Commission to the arbitrators selected by the parties hereto as compensation for their services as such arbitrators. And that, in case you do not make such election or fail to deposit the sum of twenty dollars with such election; or, in case the compensation claimed is not for "partial permanent or total permanent incapacity or for death," an arbitrator designated by said Commission shall determine said matter.

Form 33 (Memorandum of Names and Addresses for Service of Notices) is also enclosed herewith, and should be filled out and filed with said Commission in said matter at once.

Dated this 27th day of January, 1930.

Industrial Commission of Illinois, by Walter F. Rohm, Secretary. (Seal Industrial Commission Dept. of Labor, Illinois.)

Notice of Hearing

You are hereby notified that a hearing in the above entitled matter will be held on the 24th day of February, 1930, at 1:30 o'clock P. M., at 205 W. Wacker Drive, in the City of Chicago, Illinois, before the arbitrator designated by the Industrial Commisison of Illinois.

Dated this 27th day of January, 1930.

Industrial Commission of Illinois. Walter F. Rohm, Secretary.

[fols. 23 & 24] BEFORE THE ARBITRATOR OF THE INDUSTRIAL COMMISSION OF ILLINOIS

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

NOTICE OF HEARING—Jan. 27, 1930

To Pet., thru J. W. Hortwitz, 10 S. La Salle St., Chicago, Ill.; Res., thru A. R. Swanson, 724-332 So. Michigan Ave., Chicago, Ill.:

You are hereby notified that a hearing in the above entitled matter will be held on the 24th day of February, 1930, at 1:30 o'clock P. M., at 205 W. Wacker Drive, in the City of Chicago, Illinois, *Illinois*, before the arbitrator designated by the Industrial Commission of Illinois.

Dated this 27th day of January, 1930.

Industrial Commission of Illinois. Walter F. Rohm, Secretary, 205 W. Wacker Drive, Chicago, Ill.

New address: 205 W. Wacker Drive, Chicago, Illinois.

[fol. 25] BEFORE THE INDUSTRIAL COMMISSION OF ILLINOIS

No. 158,174

JOE THOMAS

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co.

Statement of Evidence Before Arbitrator—Filed April 18, 1930.

CAPTION

Be it remembered that on the 24th day of February, 1930, the above entitled cause came up for hearing before Miss Hariett Reid, one of the Arbitrators of said Commission, in one of the hearing rooms of said Commission at 205 West Wacker Drive, Chicago; whereupon the following proceedings were had:

Appearances:

Mr. J. W. Horwitz and Mr. B. E. Cohen, 10 S. La Salle St., Chicago, for the Petitioner.

Mr. E. W. Rawlins, 105 S. La Salle St., Chicago, for the Respondent.

P. C. Rennwald, Reporter.

[File endorsement omitted.]

[fol. 26] STIPULATION AS TO FACTS

The Arbitrator: It is stipulated and agreed by and between the parties that on the 15th day of July, 1929, said petitioner was an employe of said respondent; that said petitioner sustained accidental injuries on that date; that notice of the accidental injury was given said respondent; that claim for compensation was made within the proper time; that the average weekly wage during the year next preceding the injury was $28.35, that the respondent has furnished the necessary first-aid, and medical services; that the questions in dispute are, whether or not this injury sus-

tained on the 15th of July, 1929, arose out of and in the course of his employment and whether at that particular time the employe and the employer were operating under the provisions of the Workmen's Compensation Act or the Federal Employers' Liability Act, whether there is any period of temporary total incapacity for work; the nature and extent of any permanent disability; whether respondent is liable under the provisions of the Workmen's Compensation Act. Can you make the usual stipulation about extension of time to the reporter in case of appeal?

Mr. Horwitz: Yes.

Mr. Rawlins: Yes.

The Arbitrator: The witnesses be sworn.

[fol. 27] (Whereupon the witnesses were duly sworn.)

Whereupon JOE THOMAS, the petitioner, was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Horwitz:

Q. What is your name?
A. Joe Thomas.

The Arbitrator: You must talk up. We must hear you. Talk right up.

Mr. Horwitz:

Q. Where do you live?
A. Chicago Heights, Illinois.
Q. What address?
A. 1614 Fifth Avenue.
Q. On the 15th of July 1929, whom were you employed by?
A. C. & E. I.
Q. By that you mean the C. & E. I. Railroad Company?
A. Yes.
Q. Where is that at?
A. Chicago Heights, Illinois.
Q. How long have you been with them?
[fol. 28] A. I have been ten years.

The Arbitrator: Keep your voice right up, Mr. Thomas; talk right out.

Mr. Horwitz:

Q. You haven't been with the same company for ten years—they were taken over recently?
A. They were taken over recently.
Q. The last two years?
A. Two years.
Q. And you have been doing the same kind of work?
A. The same kind of work.
Q. Now, what happened to you on July 15, 1929, while in the employ of this railroad company.
A. I got hurt.
Q. Just tell what happened.
A. I got hurt working on a machine, electric motor and I was oiling an electric motor underneath.
Q. Is this motor a stationary motor?
A. A stationary motor.
Q. How long has that motor been there?
A. It has been there longer than I can recollect.
Q. Longer than you can recollect?
A. Sure.
Q. Was it bolted on to the floor?
[fol. 29] A. Screwed onto the floor—bolted to the floor.
Q. How big is this motor?
A. Oh, it is about so large, I guess.

Mr. Horwitz: Indicating two and a half feet long, would you say?
A. A little better than that. And about that high (indicating).

The Arbitrator: Indicating about three and a half to four feet high.
Mr. Horwitz: Yes.

Q. And what was this motor used for?
A. To hoist coal over into the bin.
Q. Into the bin?
A. Yes.
Q. And is that a stationary bin?
A. Stationary bin.
Q. And how often have you done this work?
A. How often have I done this work?
Q. Yes, within—well, during a week how often did you do that?

A. Every day.
Q. Every day?
A. Every day.
Q. Now, what happened—how did you get your hand injured?
[fol. 30] A. I was oiling.
Mr. Horwitz: Yes. And is this run by—what is it run by, gears?
A. Gears; gears.
Q. What happened—tell us?
A. As I was turning—I was oiling and it snatched my hand right in—arm right in.
Q. You got your hand snatched in?
A. Yes.
Q. That is the right hand?
A. Yes.

Mr. Horwitz: Right hand.

Q. And what happened to you there then as it was snatched in?
A. It was hurt.
Q. It was hurt; all right. Did any part of your hand—right hand remain in the machine or did you get it all back?
A. Sure.

The Arbitrator: Let's see.

Q. Was the thumb and these fingers—was it cut—was this cut off by the machine or did the doctor operate?
A. Cut off with the machine.

The Arbitrator: Let the record show that the right thumb has just one phalange, the proximal phalange, the distal phalange being absent; that the index finger of the [fol. 31] right hand is also lacking the distal phalange. The middle phalange of the right hand is missing.

Mr. Rawlins: The distal phalange.
The Arbitrator: The distal phalange. The middle and ring fingers are there in their entirety.

Mr. Horwitz:

Q. Now, did you go to a doctor?
A. Yes.

Q. And how long have you been under the treatment of a doctor since the time of the accident?

A. My first doctor?

Q. Well, all the doctors.

A. Oh, about——

Q. Up until when?

A. —four months.

Q. You were under treatment of doctors about four months?

A. Four months.

Q. Now, have you ever had an injury to that hand before?

A. No, sir.

Q. Well, what is the trouble with your hand now, what do you complain of?

A. Stiff. I can't use it.

Q. Well, can you close your hand?

A. I can't close my hand any more than that (demonstrating).

[fol. 32] The Arbitrator: Find out if he had any infection in the hand.

Mr. Horwitz:

Q. What kind of treatment did the doctor give you?

A. What do you mean?

Q. If you know?

The Arbitrator:

Q. What did he do for you?

A. He dressed it and took dead bone out of this finger.

Q. Out of the index finger?

A. Yes.

Q. Was there pus coming out of the hand?

A. Yes.

Q. Which finger?

A. Both of them.

Q. The index and middle finger?

A. Yes.

Q. Did they have any drains in there——

A. Any drains?

Q. —so that pus come out?

A. No.

The Arbitrator: Ask about the children?
Mr. Horwitz: Yes, I will go into that.

Q. You had Dr. Bohart take care of You?
A. That was my last doctor.
Q. When did he discharge you,—how many weeks since [fol. 33] he discharged you?
A. Well, I could not tell, but I have got his ticket in my pocket.

Mr. Horwitz:

Q. It was on January 22?
A. I can't tell right now. Wait a minute. I will show you in a few minutes.

Mr. Rawlins: Dr. Bohart is here and he can tell.
Mr. Horwitz: I just want to get the dates on that.

(At this point the witness handed a paper to the Arbitrator.)

The Arbitrator: It bears the date of January 22, 1930.
Mr. Horwitz: All right. That is the date I want to have fixed as the termination of the temporary.

Q. Now, are you married, Mr. Thomas?
A. Yes, sir.
Q. How many times have you been married?
A. This only makes twice.
Q. And have you any children?
A. Yes, sir.
Q. By which marriage?
A. My first wife.
Q. How many children have you?
A. Five.
[fol. 34] Mr. Horwitz: Five—How many under the age of sixteen?
A. Three.
Q. What are their names?
A. Frost.
Q. How old is Frost about?
A. He is about thirteen.
Q. And who else?
A. Doc.

Q. How old is Doc?
A. He is about twelve.
Q. And how old is the next one, what is the name?
A. June Emma. She is my girl.
Q. How old?
A. Ten.
Q. What is the name of your wife?
A. Minnie Belle.
Q. Where is she now?
A. She is down South.
Q. Are the children with you?
A. No, I haven't got any with me. They are with her.
Q. Have you seen them lately?
A. I haven't seen them about a year.
Q. Do you support them?
A. Sure.
Q. Sending them money right along?
A. Right along.

—. ——.

[fol. 35] A. Aberdeen, Mississippi.

Mr. Horwitz:

Q. Who are they with?
A. With their mother.
Q. Now, in the work that you did for the C. & E. I. Railway what other duties did you have to do there?
A. Outside of hoisting coal?
Q. Outside of taking care of the engine and hoisting coal?
A. Taking care of the coal chute, roundhouse and cinder pit.
Q. When were you,—describe your employment, whether mechanic or laborer?
A. Laborer.
Q. Now, in this oiling of the machine—I withdraw that question. This coal chute that you have described which was near to the machine or coal bin—was the coal bin right near the machine?
A. Setting right beside of it.
Q. You dumped the coal into that bin?
A. Yes.
Q. Who did the dumping of the coal?

A. Common laborer.

Q. After the bin was loaded with coal what would you do to get the coal out of the bin?

A. Get the coal out of the bin, you hoist it.

[fol. 36] Mr. Horwitz: Into what?

A. Into the coal bin.

Q. Of the engine?

A. No.

Q. Into another coal bin?

A. Into another coal bin.

Q. Didn't you have some engines come into this place where you worked?

A. Yes.

Q. Where was that?

A. The roundhouse.

Q. You had some engines come there?

A. Switch engines.

Q. What are they, switch engines?

A. Yes.

Q. Were those small switch engines or large?

A. Small.

Q. You never—did you have anything to do with these switch engines?

A. Well, I watered them and coaled them up.

Q. How often would you do that?

A. Once a day.

Q. What time of the day?

A. Well, from two thirty to three thirty.

Q. At night or morning?

[fol. 37] A. In the morning. In the evening—in the afternoon.

Mr. Horwitz:

Q. Was that after the engines were through with the run or before they would go out on a run?

A. When the accident happened?

Q. No, no, no. I mean when would you put coal and water in the engines—was that after they came in from a run or *or* going out?

A. After they came in.

Q. And how long a time after you watered them and coaled them would they go out on a run?

A. Well, from three thirty until six—something like that.

Q. Now, you saw these little engines every day?

A. Every day.

Q. Every day. And what were they used for, if you know?

A. What were they used for?

Q. Yes.

A. Pulling freight out of those factories and pulling in freight; carrying out freight, and carrying in freight.

Q. Which factories were they?

A. Chemical, manganese.

Q. Where were they located, around Chicago?

A. Around Chicago Heights.

Q. You had nothing to do with freight, packages or any-[fol. 38] thing of that kind?

A. No.

Mr. Horwitz:

Q. Your duties were to take care of this machine, stationary machine, put coal into the bins and take it out and water these little engines that would run around Chicago, and keep them clean?

A. Yes.

Q. Would you ever use a broom?

A. Sure. I used a broom every day.

Q. For what?

A. Sweeping the roundhouse out, cleaning up.

Q. Was this one of the cards that was issued to you?

A. Issued to me.

Q. 1929—I ask that be introduced in evidence as——

Mr. Rawlins: What is it for?

(Whereupon the paper was handed to Counsel for the respondent.)

Mr. Horwitz: Petitioner's Exhibit 1.

Mr. Rawlins: I have no particular objection. I don't think it is material.

Mr. Horwitz: The only thing I want to show is that he was a laborer.

The Arbitrator: Can't you stipulate that he is a laborer if that is all there is to it?

[fol. 39] Mr. Rawlins: I don't deny that he worked for us; that whatever he did speaks for itself.

The Arbitrator: It isn't necessary to have that particular card.

Mr. Horwitz:

Q. Now on this particular day that you were oiling this stationary machine was there any hoisting, did you do any hoisting of coal—or was anybody besides you working around this machine?

A. Nobody but myself.

Q. There was no coal being put in?

A. No.

Q. And no coal taken out?

A. And no coal taken out.

Mr. Horwitz: I think that is all.

Cross-examination.

By Mr. Rawlins:

Q. Mr. Thomas, this morning that you were doing—on the day you got hurt and at the immediate time you got hurt, was you hoisting coal from a bin down on the ground up into the chute?

A. Yes, sir.

Q. In other words, this motor or engine that you were operating was an engine which you operated for the pur-

[fol. 40] pose of keeping the coal chute filled with coal?

A. Yes.

Q. And the coal from that chute was used to put in engines that worked in and about the yards at Chicago Heights?

A. Yes.

Q. And that was the constant use to which that was put, every day you had to keep that bin filled with coal?

A. Every day.

Q. And if the engines needed coal they would come up there and the coal would be dumped from overhead down into the engine?

A. Yes.

Q. And, at the immediate time that you were hurt, Mr. Thomas, you were actually engaged in hoisting coal from

the ground up the chute overhead, that is true, you were actually engaged in filling a bin up at the time you got hurt?

Mr. Horwitz: Just a minute. Did you understand what the word engaged means?

The Arbitrator: He means you were doing that.

Mr. Horwitz: The lawyer is asking you what you were doing at the time when you got hurt.

A. Oh, I was to hoist coal.

Mr. Rawlins:

Q. And the engine was running?

—. ——

[fol. 41] Mr. Cohen:

Q. Were you hoisting coal at that time when you got hurt—were you hoisting coal?

A. Sure I was.

Mr. Cohen: I don't think he understands the question.

Mr. Horwitz: No.

The Arbitrator: You better let the respondent continue with framing the questions again.

Mr. Rawlins:

Q. The work you were doing there was at this engine?

A. I was working with the motor.

Q. And that motor was the motor that was regularly used to hoist coal from the ground up into the chute overhead?

A. Overhead.

Q. And at the time the engine was running, wasn't it?

A. It was running.

Q. Was coal being hoist at the time or just running?

A. Just running.

Q. How long had it been running?

A. Just a few minutes.

Q. Just getting ready to start hoisting coal?

A. To start hoisting coal.

Q. After you started the engine running what was the next step that you would do to get the coal up?

[fol. 42] A. Well, going around, pulling down a door and filling my bucket, and I reached right over back here (indicating) and get my lever and putting her in gear and then the bucket would go up.

Mr. Rawlins:

Q. That is the way you filled the chute?
A. Yes.
Q. That was your regular work?
A. Yes.
Q. And that coal that you hoisted up into the chute was all used in these engines, wasn't it?
A. Yes, sir.
Q. Around the yard?
A. Around the yard.
Q. Switch engines?
A. Yes.
Q. They were engines that switched freight back and forth on the various tracks there at Chicago Heights?
A. Yes.
Q. That is, these engines would haul freight that comes from out of town to the plants of industries?

Mr. Cohen: If you know.

Mr. Rawlins:

Q. What did they do?
A. That is what they do.
Q. They would haul freight from different industries [fol. 43] around Chicago Heights out away from them as well as haul freight into them?
A. What do you mean?

The Arbirtrator: He means factories like the manganese and chemical that you spoke about, bringing freight in and out from them,—he calls them industries?
A. In and out.

Mr. Rawlins:

Q. That is what they were doing all the time every day?
A. Yes.
Q. There were other engines—there were some engines that switched around the C. & E. I. that also coaled up there?

A. Yes, that is right.

Q. That engine or those engines that were coming out of the C. & E. I. they worked further down south?

A. Yes.

Q. And that engine would coal at your chute?

A. Yes.

Q. And it did it all the time?

A. All the time.

Q. With reference to the work, this other work which was watering and coaling engines——

The Witness: Yes, sir.

[fol. 44] Mr. Rawlins: —now tell us what you did when you coaled the engines, how did you do that?

A. Well, in coaling those engines you get up on top.

Q. Would you run up to this chute yourself?

A. Sometimes I did and sometimes I didn't.

Q. But you would unload the coal from the chute into the engines?

A. That is right.

Q. Into the coal bin or whatever it was on the engine?

A. Yes.

Q. Into the coal tender?

A. Yes.

Q. That was a regular part of your duties?

A. Yes.

Q. Every day?

A. Every day.

Q. That is the same engine that you have been describing here?

A. Yes.

Q. In watering them where would you water them—how would you water them—what did you do?

A. On top and pull that chute down and open it.

Q. Where was this water, in the same place?

A. The same place.

Q. Who pumped the water up?

A. Who pumped it?

[fol. 45] Mr. Rawlins: Yes. How did the water get up into the tank?

A. There is an automatic valve.

Q. You didn't work that?

A. No.

Q. But you would tap the water or empty the water into the tank of the engine?

A. Yes.

Q. That was a regular part of your everyday work?

A. Yes, sir.

Q. This engine stands on the floor, doesn't it?

A. Yes.

Q. It is about three and a half feet high?

A. Just about.

Q. And the top of it all covered?

A. Yes.

Q. The gears on top are all covered over?

A. Yes. Of the engine?

Q. Yes. As you look at it from the top the gears are all covered gears.

The Witness: Repeat that again.

Mr. Rawlins:

Q. You know what gears are or cogwheels are?

A. Sure.

Q. The top of those was covered over with a guard?

Mr. Horwitz:

Q. There was a safety on?

A. On the engine?

[fol. 46] Mr. Rawlins: Yes. The gear wheels.

A. On top?

Q. Yes, the motor.

The Arbitrator: You see, we can't hear you unless you talk up. Speak right out. What was it you said?

A. I said, yes, it was covered on top.

Mr. Rawlins:

Q. How would you grease it, you reached down into the machine and came up under the cog-wheels?

A. The motor.

Q. Down under the motor?

A. Down under.

Q. You went way down and reached up?

A. No, it didn't go so very far down.
Q. Down to the part that was covered?
A. Underneath?

The Arbitrator: That is no answer, down underneath.

Mr. Rawlins:

Q. You were down underneath the motor?
A. Down underneath the motor.
Q. And underneath the guard that was on top?
A. No, there ain't any guard under.
A. The whole top is guarded?
A. Not all the way, not under here.
Q. No. You couldn't reach it if there was a guard on?
[fol. 47] A. If there was a guard there you couldn't have got to it.

Mr. Rawlins:

Q. But you had to reach underneath the guard to reach where you were?
A. No, right down underneath. There was a guard on top like this (indicating), just like a rainbow. I had to reach down underneath.
Q. What were you using—you were using pin grease?
A. Yes.
Q. How did you come to be using pin grease on that machine, that isn't what is used on that, is it?
A. What?
Q. Pin grease.
A. Well——
Q. How did you come to use that pin grease that day?
A. Because it lasted longer than other grease I put on.
Q. You had an oil can, didn't you?
A. No oil can.
Q. Didn't you have oil cans there—there are lots of them?
A. There are lots of them but I didn't have them around there.
Q. You are the one who would get the grease or oil?
A. Sure.
Q. You were the fellow who had charge of this motor?
[fol. 48] A. Yes, I had charge of it all right.

Mr. Rawlins:

Q. And you picked up the kind of grease you wanted?
A. The kind I needed.
Q. You could oil that from under without reaching up?
A. To put in pin grease?
Q. You wouldn't have to do that by using an oil can?
A. I didn't have any oil can at that time.
Q. I know, but there were plenty of oil cans in the roundhouse?
A. Yes, there are some there.
Q. This motor—now listen to me, Mr. Thomas.

The Witness: All right.

Mr. Rawlins:

Q. This motor and this coal chute where you placed this coal that was fixed there and had been in that same condition for a number of years?
A. So far back I can't recollect.
Q. Regular fixture?
A. Yes.
Q. And had been used all the time for coaling, getting coal into these engines that were switched around Chicago Heights that you have described—your answer is yes?
A. Yes.

[fol. 49] Mr. Rawlins:

Q. Now, about how many engines were there?
A. How many?
Q. Yes, about how many engines.
A. Well, there was five in all.
Q. Including the C. & E. I.?
A. Yes, sir.
Q. They worked there every day?
A. Every day.
Q. And those engines handled all the freight?
A. Yes.
Q. That is handled in those yards?
A. Yes, sir.

Mr. Rawlins: That is all.

Redirect examination.

By Mr. Horwitz:

Q. How big—how many bins were there or are there in this roundhouse?

A. How many bins?

Q. Yes.

A. Two.

Q. How large is a bin?

A. They are about——

Q. The size of this room or larger?

[fol. 50] A. Not quite as large; about half as large.

Mr. Horwitz:

Q. Each bin is the same size?

A. About half as large as this. One goes straight down and one goes like this (indicating).

Q. And who puts in the coal in the first bin when it comes into this roundhouse?

A. Laborer.

Q. You do or somebody else?

A. Somebody else.

Q. And these bins, the first is used for storage purposes?

A. Yes.

Q. And then you remove the coal from the first bin and put it into the second bin?

A. The second bin.

Q. And then if any of those little engines come you put it into the little engines?

A. Put it into the little engines.

Q. Are you familiar with the engines that go out of Chicago?

A. No, sir.

Q. How large are the engines—these little engines?

A. Well, they are pretty good sized little engines.

Q. About how big?

A. Oh, I could not tell. If I could see one I could show you.

[fol. 51] Mr. Horwitz:

Q. Compared to the large—you have seen freight engines or passenger engines?

A. About half—just about half is as near as I can come at it.

Q. There is no freight that comes into the roundhouse?

A. No.

Q. As a matter of fact you have never seen these engines——

Mr. Rawlins: Wait a minute. Ask him. You are arguing.

Mr. Horwitz: No, I am not.

Q. As a matter of fact you have never seen these engines haul any freight?

A. No.

Q. Now, in regard to this stationary engine that is used for hoisting—you mentioned that there was a rainbow guard on top of it?

A. On the top.

Q. Was a guard underneath it?

A. No.

Q. Should there have been a guard underneath?

Mr. Rawlins: I object and ask it be stricken.

The Arbitrator: Strike it.

Mr. Horwitz: Well——

The Arbitrator: He can state what there was but he can't state what there should be there. He can only state what he saw there.

[fol. 52] Mr. Horwitz:

Q. Well, is this condition underneath those engines a dangerous condition without a guard?

Mr. Rawlins: I object.

A. Yes, certainly it is.

The Arbitrator: That is a conclusion. You can have him describe——

Mr. Horwitz: Yes.

Mr. Rawlins: He knew it anyhow.

Mr. Horwitz: It doesn't make any difference.

Q. In order to oil this machine properly could it have been done from the top or did you have to go underneath when you oiled it?

A. I had to go underneath.

Mr. Rawlins: I object to it as a conclusion.

Mr. Horwitz:

Q. You had to go underneath?
A. Yes.

The Arbitrator: Just state how you did go.
Mr. Rawlins: I ask that it be stricken.
The Arbitrator: Strike it.

Mr. Horwitz:

Q. Describe how you would do it—you went underneath—assume the engine is standing on top——
The Witness: It is right here?
Mr. Horwitz: Yes.
[fol. 53] The Witness (continuing): My knees like this (indicating), on one knee, the knee-cap, and I had on a pair of gloves. I took it and stuck it under there.

Mr. Horwitz:

Q. How far underneath would you have to stick it under there?
A. Oh, about that far (indicating).

Mr. Horwitz: Indicating up to——
The Arbitrator: About six or eight inches above the wrist.

Mr. Horwitz:

Q. And you say there was no way you could reach the bottom?
A. No.
Q. From the top?
A. No.
Q. You mentioned something about a large engines, didn't you, that came there or was there?
A. There was a large engine that come in from the C. & E. I. that is the largest we got.
Q. Did that engine bring in any freight?
A. Any freight?
Q. Yes.

A. Well, sometimes she brings in freight from the main line, see?

Q. What do you mean sometimes?

A. Pushed up into the yard.

[fol. 54] Mr. Horwitz:

Q. When it comes into the roundhouse?

A. No.

Mr. Horwitz:

Q. Where you are working does it bring any freight?

A. No.

Q. How large is this roundhouse we are talking about?

A. Well, it is a pretty good sized little place. It holds five engines.

Q. Closed in?

A. She is closed in.

Q. So that, in other words, no,—you couldn't form a train,—an engine with a bunch or string of cars?

A. No, sir.

Q. In other words, this is what they call a switch yard?

A. Switching.

Mr. Horwitz: Unless the Arbitrator wants to ask something else——

The Arbitrator:

Q. Was this injury confined just to the index finger and middle finger?

A. Which?

Q. The injury, did it injure the little finger and the ring finger?

A. Stiffened, yes. They have been stiff since the injury.

Q. Did you have you- hand in a cast or splint?

[fol. 55] Mr. Horwitz:

Q. Did they put them in a cast?

The Arbitrator: Or splint?

Mr. Horwitz: A piece of wood or iron?

A. No, they didn't put no board there.

The Arbitrator:

Q. What use have you got of the little finger?

A. That is all, just like that (illustrating). That (demonstrating) is as far as I can get it unless I take my hand and bend it.

Q. Now, if you take your hand and bend the middle,—I mean,—strike that. The ring finger, this finger (indicating) and the little finger, can you bend them into the palm?

A. No.

Mr. Horwitz: Close your whole hand as much as possible.

A. That is as far as I can get it.

The Arbitrator: Now, he makes a fist and this little finger and the ring finger are about two inches from the palm.

Q. What about the motion of the hand or wrist?

Mr. Horwitz: I was going to go into that.

A. It is a little bit stiff.

Q. In regard to your right forearm, is there any trouble with that?

A. Stiff, all stiff in the arm.

Q. Is it smaller or larger than the other?

[fol. 56] A. Smaller.

Mr. Horwitz: Will you take your coat off?

(Whereupon the coat of the petitioner was removed.)

Mr. Horwitz:

Q. Can you do this (illustrating)?

A. I can't do it; it takes some time.

The Arbitrator:

Q. What about the movement of the arm in the elbow?

A. Stiff.

Mr. Horwitz: I have medical testimony.

The Arbitrator: Are you going to have medical?

Mr. Horwitz: Well, I am going to wait for the doctor.

The Arbitrator: You would expect nothing further just up until now.

Mr. Horwitz: There is atrophy.

The Arbitrator: It would be strange if there wasn't any.

Mr. Horwitz:

Q. How about bending it?

A. It is all stiff. The whole arm is stiff. Up in here it is stiff. Here (indicating) is where the big trouble is in my shoulder. That is where it is right in there (indicating).

The Arbitrator:

Q. When you got your hand in there did it pull you- arm and shoulder in?

A. It snatched me all plumb in.

Q. You felt you were snatched in from the shoulder?

A. Yes.

[fol. 57] The Arbitrator:

Q. There was pus, you say, came from the index finger and the middle finger,—did you- hand swell up above the wrist much?

A. Yes.

Q. How far up did it swell?

A. Well——

Q. How far up the arm?

A. To about there (indicating).

The Arbitrator: He is indicating about five inches from the bend in the wrist that the swelling extended.

Q. When the doc*o*tr was taking care of you up until January, was he paying particular attention to this index finger,—was that the one that the pus came out of?

A. Yes.

Q. Until just recently?

A. Yes.

The Arbitrator: Any other questions?

Mr. Rawlins: Yes.

Recross-examination.

By Mr. Rawlins:

Q. Mr. Thomas, will you listen to me so I can make it plain for you. This motor that you were working on, this

coal chute, and the apparatus, hoisting app-ratus, were all connected together?

[fol. 58] A. The motor?

Mr. Rawlins: The motor and the chute in which you dumped the coal, and the hoisting apparatus, were all together, weren't they?

A. Yes, they were all together.

Q. You talked about bins where the coal was dumped, what you mean by that is the coal brought in railroad trains, cars?

A. Yes.

Q. And dumped there on the ground or the bin right near the coal chute and you elevated it up to the top?

A. Yes.

Q. Now, you say you didn't see any of these engines haul freight when they came into the roundhouse, that is true?

A. Yes.

Q. They are disconnected from the train?

A. Which is?

Q. When the engines are pulled to the roundhouse they have been pulled off from the cars?

A. Yes.

Q. But you have seen these engines go back and forth on the track pulling cars?

A. Yes.

Q. Every day?

A. What?

[fol. 59] Mr. Rawlins:

Q. You have seen them pull loads of coal into industries?

A. Yes.

Q. You have seen them haul loads of coal and lumber into industries?

A. Yes.

Q. And all kinds of commodities you have seen them pull?

A. Yes.

Q. You have seen them pull loads of freight out of those industries?

Mr. Horwitz: Wait a minute.

The Arbitrator: Yes or no?

A. Yes.

Mr. Rawlins:

Q. And you say——

Mr. Horwitz: Just a minute. Pardon me. The man doesn't understand the word industries.

The Arbitrator: He understands all right. He understands him.

Mr. Horwitz: He has never been to one of those industries in his life, I venture to say.

Mr. Rawlins: You have seen them haul loaded cars back and forth on different tracks.

Mr. Horwitz: On the outside of the place of business?

Mr. Rawlins: I am asking these questions. If you think [fol. 60] they are wrong you can object.

Mr. Horwitz: Well, I object to the form of the question.

Mr. Rawlins:

Q. What did you see those engines pull, tell us?
A. Well, I have seen them pull loads outside.
Q. Outside, where?
A. Freight on the outside.
Q. What do you mean by outside?
A. On the outside tracks.
Q. What about the inside tracks?
A. In the yard coming on the inside track.
Q. What do you mean by inside?
A. That comes into my roundhouse.
Q. The outside tracks are the tracks which lead to the industries, you mean by that that tracks that lead into the business places in Chicago Heights?
A. Yes.
Q. And the C. & E. I. engines were doing the running?
A. The big ones?
Q. Yes.

Mr. Horwitz: If you know.

A. Well, it comes over to our roundhouse.

Mr. Rawlins:

Q. What have you seen it do?
[fol. 61] A. Well, I have seen them back in some freight, something like that.

Mr. Rawlins:

Q. Often, haven't you?
A. Pretty often.

Mr. Rawlins: That is all.

Q. How far is the coal chute from the roundhouse?
A. Well, it is about fifty or sixty yards, maybe a hundred right around there,—well, I will say about seventy-five.
Q. And that is entirely separated from the roundhouse?
A. Separated.

Redirect examination.

By Mr. Horwitz:

Q. Thomas, how many hours did you—do you put in at work?
A. In the roundhouse?
Q. Yes.
A. Eight hours.
Q. And do you work outside of the roundhouse?
A. I take care of the office.
Q. You have other duties then?
A. I have other duties.
Q. What are your duties in the office?
A. Cleaning up, sweeping up, dusting up.
Q. Where is the office at?
A. Right on this side (indicating).

[fol. 62] Mr. Horwitz:

Q. How many hours did you work in the office?
A. About an hour and a half.
Q. So that, in other words, you worked about nine and a half hours?
A. Yes.
Q. Do you- duties take you a mile away from your roundhouse?
A. No.
Q. Did you ever go a mile away from there?
A. No, sir.
Q. Have you ever been over to the industries?
A. No, sir.
Q. Now, then, when that little engine or those five engines that you are talking about leave the roundhouse do you know where they are going?

A. No, but right around the town.
Q. But you don't know where?
A. No.
Q. Unless somebody else told you?
A. Unless somebody tells me, that is all.
Q. And do you know what kind of freight or goods these little engines haul?
A. No.
Q. Do you know where they go?
A. No.
Q. In other words, all you know is your roundhouse work?
[fol. 63] A. That is all, roundhouse work?

Mr. Horwitz: That is all.
Mr. Ralins: That is all.

(Witness excused.)

Mr. Horwitz: We are expecting our doctor here any minute.
Mr. Rawlins: All right.
Mr. Horwitz: Unless we can possibly agree.
Mr. Rawlins: We can put the doctor on when he comes. And we can put on our case.
The Arbitrator: All right. This is the respondent's case then.

Whereupon B. S. Lottinville was called as a witness in behalf of the respondent and, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rawlins:

Q. Will you please state your name?
A. B. S. Lottinville.
Q. Where do you live?
A. Chicago Heights.

[fol. 64] Mr. Rawlins:

Q. What is your business?
A. General agent of the Chicago Heights Terminal Transfer Railroad Company.

Q. As general agent what are your duties?

A. I have supervision of the handling of traffic and general work of the terminal.

Q. That is by that you mean, if I get it right, you are the man of the Chicago Heights Terminal Transfer Company that has the management or supervision of the traffic?

A. Yes, contract.

Q. By contract you mean?

A. Contract with the public and the carriers.

Q. Do you know Mr. Thomas here?

A. Yes, sir.

Q. Do you remember the time he got hurt?

A. Yes, sir.

Q. What was his job?

A. Well, he was a laborer at the roundhouse, having the care of engines, watering and taking care of the cinder pit, coaling engines, unloading coal from cars into the pit and from the pit he would elevate coal into the coal bins.

Q. In doing that would *be* use this motor that was described here?

[fol. 65] A. Yes, sir.

Mr. Rawlins:

Q. Describe that motor and that coal bin, just what it was?

A. The coal bin is an upright structure that holds about one hundred tons of coal. It is right adjacent to a track, called the coal track from which the coal is unloaded from the cars into the pit, and the motor is located in a small house adjacent to the coal bin and it is used in hoisting coal from the pit into the coal bin from which the engines are supplied.

Q. That is a permanent structure?

A. That is a permanent structure.

Q. And has been there how long?

A. Several years, as long as I know.

Q. Now, the coal that is hoisted up into that coal bin that you have described was used for coaling engines?

A. Yes.

Q. And what are the engines used for?

A. Terminal engines, Chicago Heights terminal engines, switch engines, and C. & E. I. switch engines.

Q. Now, these Chicago Heights Terminal engines what are they used for?

A. For switching freight coming from various lines, the [fol. 66] Chicago, Milwaukee & St. Paul, the B. & C. T. Railroad, the Michigan Central, the C. & E. I.

Mr. Rawlins:

Q. That is, they switch freight from them to——

The Witness: Various industries on the Chicago Heights Terminal Railroad and switch cars loaded with freight coming from these industries going out bound beyond.

Q. What are some of those industries?

A. The American Manganese Steel.

Mr. Horwitz: I object to that part so far as our claim is concerned.

Mr. Rawlins: It is a question of what is the character of the freight that is moved.

Mr. Horwitz: Well, we are not interested. We have no freight here involved. All we have involved is the roundhouse, and the roundhouse has nothing to do with freight. He so testified. You have no right to go into the question of any freight. We are not interested at all. No question here as to any freight. The testimony clearly stated that he was a laborer that put coal into the little engines that come into the roundhouse.

The Arbitrator: Let us find out the character of these engines.

Mr. Horwitz: Well, the character, he says, is that of [fol. 67] switch engines.

The Arbitrator: They have to do something.

Mr. Horwitz: That is what they are doing. They are switch engines. That is our testimony.

Mr. Rawlins: What are they switching? That is what we want to know.

Mr. Horwitz: We are not interested in what they are switching. We have cases directly in point.

The Arbitrator: Well, I would like to see them.

The Arbitrator: This is off the record.

(Off the record.)

Mr. Horwitz: I made an objection for the purpose of the record.

The Arbitrator: Objection overruled.
Mr. Rawlins: What is that question now?

(Whereupon the question referred to was read and is as follows: Q. "What are some of those industries?")

A. The American Manganese Steel Company, the Hamilton Piano Company, the Columbia Cold Steel Company, the Benjamin Incorporated Scrap-Iron, the Victor Chemical Company, the Calumet Steel Company, the Morton Frog & Brass Works, the Armour Fertilizer Works, the Flint Coke Company, the Construction Machinery Company, the Chemical Manufacturing Company, Hartwell Brothers, the National Tea Company, Standard Lumber Company.

[fol. 68] The Arbitrator: I think that is enough.
Mr. Rawlins: That is enough. I didn't think there was so many.
The Witness: Sixty-five.
The Arbitrator: It is a good time we stopped.

Mr. Rawlins:

Q. You got sixty-five industries that are served in this yard?
A. Yes, sir.
Q. You say you are superintendent or manager of this little switch road?
A. Yes, sir.
Q. Do you know the kind or character of the shipments?
A. Yes, sir.
Q. What are they in a general way?

Mr. Horwitz: I object.
The Arbitrator: I think we better—if we could find out just what happened on that particular day, what were these engines and what were they doing, if he knows——
Mr. Horwitz: Yes. If he wants to go into what they were doing or what he was doing, that is all right.

A. They were running freight from the industries to the connecting lines, to the various railroad-, and from the various railroads to the industries.

[fol. 69] Mr. Horwitz: I object to that because the answer is too general.

The Witness: Well, I will be specific.

Mr. Horwitz: We have no objection to what the switch engines did at a certain time.

Mr. Rawlings: We don't think we need go that far.

Mr. Horwitz: I object to the question.

Mr. Rawlins: If the Court please, it is a fixed instrumentality just like a tower, just like a water tank. It is an instrumentality that is fixed and solid. It isn't an engine running back and forth, at one moment engaged in hauling interstate cars and at another moment engaged in hauling interstate cars, but it is part of the railroad, as much as the tracks are and the rails are, and all we need to do is to show that this railroad on which it is, is engaged in both inter and interstate commerce. That is all I care for, and the——

Mr. Horwitz: Are you referring to this railroad?

Mr. Rawlins: Yes. And the kind of commodities delivered to industries I do not care about. As far as I am concerned he may not have on that particular day handled interstate cars.

Mr. Horwitz: We are interested in that. You may not be, but we are.

Mr. Rawlins: I am not going to try to prove that, but [fol. 70] by this manager, the contract man between the railroad and the industries I intend to show the general character of the freight that is handled there in and out of that yard.

Mr. Horwitz: I object to the general character.

The Arbitrator: He stated on that particular day these engines were taking freight to various industries—to and from various industries and connecting with various railroads.

Mr. Cohen: He may state as of the date of the accident.

Mr. Rawlins: I will ask as of the date of the accident?

A. Yes, I will answer that, as of the date of the accident.

Mr. Rawlins: If they want the original record I will put it in, the original record of the movements on that day.

Q. Your business is what, again, so the Arbitrator will get the gist here—you are what?

A. I am general agent.

Q. And you are the man in direct charge of the handling of freight?

A. Yes, sir.

Q. You are contract man?

A. Yes.

Q. There are only how many men employed on that little road—I mean——.

The Witness: In my immediate——

[fol. 71] Mr. Rawlins: In your department?

A. I have fifteen.

Q. All told?

A. All told.

Q. Have you with you, Mr. Lottinville, a record of the movement of freight in the yard there that day?

A. Yes, I have.

Q. Is that the original record?

A. That is a copy of the original record.

Q. Made by you?

A. Made by the Chief Clerk.

Mr. Cohen: I object to the record then.

Mr. Horwitz: Yes.

Mr. Rawlins:

Q. Well, made under your supervision and direction?

A. Yes, under my supervision.

Mr. Cohen: I still object.

Mr. Rawlins:

Q. When was it made?

A. Made last Thursday.

Q. Well; now, aside from that record do you know what sort of shipments were made on that day with reference to inter and inter-state commerce?

A. All the record shows is all I can verify.

[fol. 72] Mr. Rawlins:

Q. What is the kind or character of freight that is handled in that yard generally, not on that day particularly?

A. Coal, phosphate, lumber, acid, scrap-iron, scrap rails, oils, paints, flooring, composition flooring, steel posts, machinery, groceries.

Q. Coal?

A. Coal.

Q. Now, where does the coal come from?

A. Coal originates in West Virginia, Indiana, Ohio, some Illinois coal.

Q. About what percentage of the coal that is handled there comes in from Illinois?

A. I would say—it is approximately thirty per cent the coal from Illinois, outside of West Virginia, Indiana, Ohio and Kentucky.

Q. The other commodities about what percentage originates here or elsewhere?

A. Between seventy to seventy-five percent outside of the State of Illinois.

Q. And that is the general character of the freight from day to day?

A. Yes, sir.

Q. The coal that is used in this chute that is used to fuel [fol. 73] engines?

A. Some of the coal used for the engines is from Indiana and from Kentucky.

Q. And as to lumber where does that come from?

A. All over, Louisiana, Texas, Wisconsin, Minnesota, Montana, Washington, California.

Q. None comes from Illinois?

A. I have never seen any lumber from Illinois.

Q. Iron?

A. Steel sheets come from Gary and Youngstown, Ohio.

Q. Is there much of that used?

A. There is considerable used.

Q. Where does the phosphate used by the chemical company you mentioned come from?

A. It comes from Tennessee; Mount Pleasant, Tennessee.

Q. You say about seventy-five percent of the traffic that is handled is freight from outside and twenty-five percent from inside of Illinois?

A. Approximately.

Q. These small, little engines are your regular switch engines?

A. These switch engines are not so small. I would rather not go into that mechanical end of it.

[fol. 74] Mr. Rawlins:

Q. But they are switch engines as distinguished from railroad engines?

A. Yes.

Q. About how many carloads do they haul?

A. Thirty five to forty.

Q. There has been some talk about the C. & E. I. coaling at that same bin. What are those engines used for?

A. Chicago Heights Yard, C. & E. I. yard.

Q. What sort of freight is handled in that yard?

A. The same as, practically the same as the terminal. Practically every car load we get flows through that yard.

Q. From both inside and outside of Illinois?

A. Yes.

Q. That is, the switch yard of the C. H. T. that connects with a number of other roads?

A. Yes.

Q. Name them will you?

A. The Chicago, Milwaukee & St. Paul.

Mr. Horwitz: I object to that.

Mr. Rawlins: We want to get the general situation.

Mr. Horwitz: I object to it.

The Arbitrator: I thought he named them before.

Mr. Rawlins: He didn't.

[fol. 75] The Witness: I named them?

Mr. Rawlins: Then pardon me. I don't want them again.

Mr. Horwitz: It is common knowledge.

Mr. Rawlins:

Q. The C. & E. I. runs into Indiana?

A. Indiana.

Q. And Missouri?

A. Missouri.

Q. And Illinois?

A. Illinois.

The Arbitrator: This is off the record.

(Off the record.)

Mr. Rawlins:

Q. Now, Mr. Lottinville, I take it, from what you say that, aside from the records, you could not tell one particular or any particular car movement?

A. No.

Q. And what you have here is a copy of the original record?

A. Yes, sir.

Mr. Rawlins: I offer that in evidence.

Mr. Horwitz: You are offering that in evidence?

Mr. Rawlins: Yes.

Mr. Horwitz: I object to it.

The Arbitrator: Just what are these records taken from?

A. That is taken from the shippers to switch the cars and from the connecting lines; in other words, the other [fol. 76] lines in Chicago with reference to instructions for moving the cars.

Mr. Rawlins: And does it show where they go?

A. Where they go.

Q. Where they are billed to?

A. Yes.

Q. And where to start from?

A. Where to start from.

Q. Was that freight?

A. Car load freight.

The Arbitrator: I wonder if you can go out and be examined by the doctor now?

Mr. Horwitz: Go with the lady and come back after you get through.

The Arbitrator:

Q. When they were made how were they made?

A. I ordered the Chief Clerk to copy them from the original documents in the office.

Mr. Horwitz: I object to that.

The Arbitrator: The objection will have to be sustained.

The Witness: You would have to bring in the original records. You would have to compare them.

The Arbitrator: That is common sense, but it is not legal.

The Witness: I realize that.

Mr. Rawlins: But if the Arbitrator please, so far as that [fol. 77] particular record of that day is concerned, in my opinion it does not make any difference, it is fixed just like the tracks. That is all.

Cross-examination.

By Mr. Horwitz:

Q. Mr. Lottinville, is that your name?

A. Yes.

Q. Now, how long have you been with this railroad?

A. I have been with the Chicago Heights Transfer Terminal Railroad since August 1, 1925—1927, I beg pardon, 1927.

Q. And with the C. & E. I. Railroad?

A. I am not with the C. & E. I. I am with the Chicago Heights Transfer Terminal Railroad.

Q. So you have nothing to do with the employment of this man, have you?

A. No, I have not.

Q. Did you ever give him instructions what to do?

A. So far as our office is concerned, I do.

Q. But personally you don't give any instructions?

A. No.

Q. How long since you have been with the C. & E. I.?

A. Since June 6, 1906.

Q. Did you ever go into the round-house where they have the engines?

[fol. 78] A. Yes, I walked through that roundhouse quite frequently.

Mr. Horwitz:

Q. When was the last time you were there?

A. The last time in the roundhouse?

Q. Yes.

A. Yesterday.

Q. And were you there on the 15th of July, 1929?

A. I was, yes.

Q. When did you see Thomas?

A. I saw Thomas after he was hurt.

Q. Do you know what time he got hurt?

A. I believe it was in the morning some time; I don't know exactly.

Q. On July 15th?

A. July 15th.

Q. Lottinville, when you were in that roundhouse on that day, on the 15th, how many switch engines were there?

A. In the roundhouse?

Q. Yes.

A. There was one in the roundhouse at that time I was in there.

Q. What was that engine doing there?

A. It was just laid off, doing nothing. It was a dead engine.

[fol. 79] Mr. Horwitz:

Q. How large is this roundhouse?

A. It has five stalls, engine stalls for five engines.

Q. When an engine comes in, who drives it in?

A. The crew.

Q. And they will leave it at the water plug?

A. Leave it at the water plug or leave it at the cinder-pit, or put it right in the round-house, it just depends.

Q. How long does it stay there?

A. It may stay there a couple of hours, or may stay over night.

Q. When that switch engine comes in there, it is not bound out for any purpose at all except to be watered and coaled?

A. Watered and coaled, or possibly for light repairs on the brakebeam which might have been down, which may happen to these engines.

Q. No freight comes into the roundhouse?

A. No. Roundhouses are not made for handling freight.

Q. Exactly. So that the roundhouse itself has nothing to do with the hauling of freight?

A. Yes. It has to do with freight. If you didn't have freight you wouldn't have no use for a roundhouse.

Mr. Horwitz: That is evading the question. I am asking you whether the roundhouse has anything to do with the hauling of freight?

[fol. 80] A. Yes. It links right in with the handling of freight.

Mr. Horwitz:

Q. How many under your employe?

A. Fifteen.

Q. Have you any bookkeepers?

A. Oh, we have about four.

Q. Are they directly interested in the handling of freight?

A. They had the books on freight.

Q. So they are part of interstate commerce?

A. Every employe of the railroad is connected with interstate commerce. Well, I am not legally minded, I can't answer.

Q. You answered that the roundhouse has directly to do with the hauling of freight.

Mr. Rawlins: I object. That is all obvious. You are not answering now?

A. No.

Mr. Horwitz: It isn't obvious to me. It seems that a round house is just like a garage to store cars over-night and has nothing to do with where they came from or are going to.

Mr. Rawlins: Are you asking a question?

Mr. Horwitz: I am asking a question

Mr. Rawlins: All right.

Mr. Horwitz: I am asking if his bookkeeper is under interstate——

[fol. 81] The Arbitrator: It makes no difference because we are not dealing with bookkeepers here.

Mr. Rawlins: No.

Mr. Horwitz: These engines that have been described are smaller engines than the regular engines that run between states?

A. No, I wouldn't say they are engines of the same class running between states.

Q. Is that a large engine or a small engine?

A. I can't answer as to the mechanical features of locomotives.

Q. In size?

A. No, sir.

Q. Just as large as a big freight engine?

A. It is smaller than a big freight engine; three wheel drive wheel.

Q. That little-engine that you saw that day standing idle, where had it come from, if you know?

A. Yes, sir; it had been standing there for about two years, to my knowledge. It is an engine we don't use.

Q. How many stalls did you say, five?

A. Five stalls.

Q. So that at times only four engines can come in at one [fol. 82] time when you find this in?

A. Yes, sir.

Mr. Horwitz:

Q. And how many engines were used that day of July 15, in and around the roundhouse coming there for the purpose of being coaled?

A. Well, probably five.

Q. What time did Mr. Thomas get injured if you know?

A. I don't know the exact time he was injured, but I believe it was some time in the morning.

Q. When these engines come to the roundhouse do they come with freight or without freight?

A. They come in there light.

Q. In other words, no freight at all?

A. No.

Q. When they go out they go out light also?

A. Absolutely. They don't haul any freight out of the roundhouse.

Q. Now, these engines are designated as switch engines?

A. They are switch engines.

Q. So that on the date these switch engines,—I withdraw the question. How far a distance do these switch engines run?

A. A day?

[fol. 83] Mr. Horwitz: Not a day. In a distance—in one distance, in one stretch?

A. They may run a mile. They may run half a mile or a quarter. They may run two miles.

Q. Well, the farthest?

A. I would say two miles and a quarter, that is in one run.

Q. In one run. They might make a hundred runs a day?
A. Yes, sir.
Q. I am talking about one individual run.
A. Yes, sir. Some of them will probably go—one engine will run probably eleven miles to twelve miles; that is, one run.
Q. In one run?
A. Yes.
Q. That is, around the different factories?
A. No, running from Chicago Heights to Yard Center.
Q. Where is that?
A. C. & E. I. yard. I said eleven miles. It is about eleven miles from Chicago Heights.
Q. Where is that?
A. North of Chicago Heights, about eleven miles.
Q. How far will a switch engine after it gets out of the roundhouse—will it run without picking up any freight?
A. Well, leaving the roundhouse, without picking up any [fol. 84] it runs about a mile.

Mr. Horwitz:

Q. About a mile?
A. Yes, sir.
Q. Now, what does it do after it picks up freight, would that come back to the roundhouse?
A. No. They don't come back to the roundhouse. They come back to the classification yard adjacent to the roundhouse.
Q. After they unload freight would they go for anything at all?
A. They don't unload freight.
Q. They remain as before?
A. Set? Well, how do you mean?
Q. Or sent with cars again?
A. Probably they are classified for the different industries in the classification yard.
Q. After this little engine gets some water and some coal it comes in idle again to the roundhouse?
A. Well, not at that time.
Q. Well, has it got another place where it picks up coal and water?

A. No, it wouldn't take coal or water, but maybe it was coaled by the crew during its hours of service. The crew might take an engine up there and coal it.

[fol. 85] Mr. Horwitz:

Q. And Mr. Thomas wouldn't have anything to do with that?

A. No. It just depends what engine is tied up.

The Arbitrator:

Q. What do you mean by that?

A. Tying up, coming in at the end of a run.

Mr. Horwitz:

Q. Do you know what Mr. Thomas' duties were?

A. In a general way, yes.

Q. He is classified as a laborer?

A. Yes, sir.

Q. You heard him mention that he had to sweep the office, take care of the office?

A. Yes, he has been given that extra duty.

Q. Is that your office?

A. General office.

Q. And he sweeps there and cleans it up?

A. Yes.

Q. And one duty is to clean up the roundhouse?

A. Yes. He has other men working with him; he isn't alone.

Q. How many other men?

A. He has another man that works with him during his hours of service, that was with him the day he was hurt.

Q. One of his duties was to take care of the office and sweep and clean it; another duty is to keep the roundhouse [fol. 86] clean with the other man?

A. Yes.

Mr. Horwitz:

Q. And another duty is to oil this stationary engine?

A. Now, that question—he naturally would take care of his apparatus.

Q. That is naturally one of his duties?

A. He has been doing it for years.

Q. Ten years?

A. Yes.

Q. And another duty is, when the crew isn't there on this little switch engine, to put water and coal in from the bins?

A. That is right.

Q. On July 15 or any day prior to July 15 or on that day that you—strike that out. Was he required to haul any freight?

A. Mr. Thomas never hauled any freight.

Mr. Horwitz: Exactly.

Q. And was he engaged that day in driving any engine?

A. I can't say positively that he was.

Q. But, so far as you know, he was not?

A. I can't say either way.

Q. That day do you know how much coal was in the bins [fol. 87] on July 15, when you were there?

A. No.

Mr. Horwitz:

Q. You don't know whether it was full or empty?

A. No. They generally fill them every day. They put coal in every day because night engines would consume coal.

Q. Was he employed in the repair of any engines?

A. No, sir, not to my knowledge.

Q. What is the usual time of the day for these switch engines to be coaled and watered?

A. Referring back to July, I believe the engines that Mr. Thomas coaled on that day would be in there possibly in the morning when he went to work or about two thirty in the afternoon.

Q. How many hours does a switch engine put in?

A. Generally—we generally try to keep them on an eight-hour schedule but we are not always successful, possibly eight or ten sometimes, and sometimes twelve hours a day.

Q. After they are through working where are they placed?

A. They are placed in the roundhouse generally at the bin or pit.

Q. In the roundhouse?

A. No, right on the outside of the roundhouse, on the pit.

[fol. 88] Mr. Horwitz:

Q. Are they inspected by anybody then?

A. Yes, we have machinists there to take care of them.

Q. Inspect them?

A. Yes.

Q. Aren't they usually loaded by the crew for the next day's work?

Mr. Rawlins: Loaded?

Mr. Horwitz: Loaded with coal and water.

Mr. Rawlins: Oh.

A. You mean supplied with coal and water?

Mr. Horwitz: Yes.

A. Well, they may be supplied with water and coal that evening or maybe it has to be coaled the next morning, also watered. Engines alive are considered both coaled and watered.

Q. But the usual method would be, if they are turned out for the day's work and they need water and coal, that part would be attended to at the end of the run, isn't that true?

A. Yes, at the end of the run.

Q. And then that engine would rest up until the next run or shift?

A. The next call out.

Q. These engines, therefore, do not—are not engaged—strike that out. These engines then are not used in the hauling of regular freight that is designated to it at that time?

[fol. 89] Mr. Rawlins: What is that?

The Witness: I don't understand the question.

Mr. Horwitz:

Q. Freight is usually designated to certain points or destination?

The Arbitrator: You mean assigned?

Mr. Horwitz: Assigned.

Mr. Rawlins: Billed?

Mr. Horwitz: Billed. These little switch engines are not engines that take this freight to their designated places?

A. No, sir.

Mr. Horwitz: That is all.

The Witness (continuing): Not very many of them. They do.

Redirect examination.

By Mr. Rawlins:

Q. Well, now, Counsel has used the word little with great frequency—these are regular ordinary switch engines, aren't they?

A. Yes, sir.

Q. Now, this coal chute that I have talked about, isn't in the roundhouse?

A. No, sir.

Q. How far away from the coal bin is the roundhouse?

[fol. 90] A. About three hundred feet.

Mr. Rawlins:

Q. This has a separate house of its own?

A. Yes.

Q. And this house just contains the motor and coal bin or hoisting apparatus?

A. Yes.

Q. These switch engines that have been referred to operate in the yards at Chicago Heights; that is, of the Chicago Heights Terminal?

A. Yes, they operate at the Heights yard.

Q. And one goes to Yard Center?

A. Yes, they alternate engines every third day, and they take trains from Chicago Heights yard—they take trains from the classification yard to the Heights yard and sent up there with additional cars and taken to Yard Center.

Q. Do you know about what time Mr. Thomas got hurt?

A. No, I don't know the exact time. I know it was some time in the morning.

Q. Along about noon or ten o'clock?

A. I am not positive. I only feel it was around ten o'clock.

Q. You don't know definitely?
A. There was a record but I never consulted it.

Mr. Rawlins: All right.

[fol. 91] Recross-examination.

By Mr. Horwitz:

Q. Do you know what Mr. Thomas was doing at the time he got injured?
A. No, I don't know.
Q. Did you hear?
A. Yes, sir—no; I asked Mr. Thomas before the doctor came to take him away to the hospital what he did and he said he took some grease and got underneath this motor and pushed it up and the cogs caught his hand, and pulled it into it. I told him that was a very difficult thing to do to go underneath the motor; that I think he should have used a can He said he knows; that is the way those things happen.

Mr. Horwitz: That is all.
Mr. Rawlins: That is all.

(Witness excused.)

Mr. Rawlings: Mr. Slaughter.

Whereupon H. W. SLAUGHTER took the stand as a witness in behalf of the respondent and, having been previously [fol. 92] duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rawlins:

Q. What is your name, please?
A. H. W. Slaughter.
Q. Where do you live?
A. Dalton, Illinois.
Q. Your business?
A. General foreman of the locomotive department.
Q. For whom?
A. Chicago & Eastern Illinois Railroad Company.

Q. Where?
A. Dalton.
Q. Did you have anything to do with the engines at Chicago Heights?
A. Yes, sir.
Q. Did you have anything to do with the supervision or maintenance of the coal chute and hoisting apparatus at Chicago Heights?
A. Yes, sir.
Q. Where Mr. Thomas was working?
A. Yes.
Q. Did he work directly under you?
A. Yes, sir.

[fol. 93] Mr. Rawlins:

Q. Now, with reference to that coal chute just describe that, how it looks and so forth.
A. The chute?
Q. Yes.
A. It is an upright structure with a track and a hopper. We dump coal from the coal cars and that is in turn—it is hoisted to a bin up overhead.

Mr. Rawlins: Yes.
The Witness (continuing): From there there is a connection to the locomotives.

Mr. Rawlins:

Q. What sort of locomotives?
A. Switch locomotives.
Q. Describe the different locomotives.
A. Well, four of those locomotives is what we term six-wheel switch engines. They weigh about eighty tons, twenty-one inch cylinder. The other ones that we use at the other yard is eighty-seven tons.
Q. Is that C. & E. I. one—is that a switch engine?
A. The average weight of our switch locomotives is eighty tons.
Q. In all the yards?
A. Yes, sir.
Q. This chute, how long had that been there?
A. I could not say. It was there some time previous to [fol. 94] our taking charge.

Mr. Rawlins:

Q. When did you take charge?
A. The 1st of August, 1927.
Q. And it has been in the same condition ever since?
A. Yes.
Q. Is it possible to get coal in position where you can feed it into the switch engines?
A. Yes, sir.
Q. Now, in connection with the operation of this chute, tell us about that.
A. Well, the coal is dumped from the cars into the hopper and elevated by use of a motor and machinery for that purpose into the bin.
Q. Do you remember what time of the day it was that you were notified he claimed he was hurt?
A. My report stated about ten A. M.
Q. After this coal was overhead it was dumped into the engines by whom?
A. Various employes.
Q. Whom?
A. Sometimes the engine crew and various employes.
Q. Sometimes Thomas?
A. I presume Mr. Thomas helped put it on engines.

[fol. 95] Mr. Cohen: I object.
The Witness: In fact I knew he did.
The Arbitrator: Strike the presume part out.
Mr. Rawlins: I think that is all.

Cross-examination.

By Mr. Horwitz:

Q. Just one question: What is the size of the regular freight engine that does hauling, how many tons?
A. They vary from eighty-seven tons to one hundred and fifty tons.

The Arbitrator:

Q. What is the size of these engines?
A. These are eighty tons.

Mr. Rawlins:

Q. Eighty?
A. Yes.

Mr. Horwitz:

Q. That is what you designate as small engines?
A. No, it isn't a small engine.
Q. It isn't smaller than one hundred and fifty tons?
A. Standard switch engine.
Q. But it is smaller than the one hundred and fifty tons?
A. Oh, yes.

Mr. Rawlins: Smaller than the big one, of course.

Mr. Horwitz: Do you know whether you can get the one hundred and fifty tons into this roundhouse?
A. I never tried it.

[fol. 96] Mr. Horwitz:

Q. Well, you are familiar with the roundhouse, would it go in?
A. I presume it could, yes.
Q. This bin that has been talked about that is used for storing coal?
A. Yes.
Q. He was under your direct employ, Mr. Thomas?
A. Yes.
Q. And he is a laborer?
A. Yes, a laborer.
Q. And it is his duty to clean up, keep the roundhouse clean?
A. Yes.
Q. He has nothing to do with the handling of any freight?
A. No.

Mr. Rawlins: I object to that as a conclusion.
Mr. Horwitz: Well, I am asking him a plain question.
Mr. Rawlins: I am objecting to it.
The Arbitrator: It is a conclusion.
Mr. Rawlins: Sure it is a conclusion.
The Arbitrator: He can state what he does do.

Mr. Horwitz:

Q. Does he handle any freight?

Mr. Rawlins: I object.

A. You mean handle packages of freight?
Mr. Horwitz: Yes.
The Arbitrator: He shakes his head, no.

[fol. 97] Mr. Horwitz:

Q. Do you know what he was doing at the time he got injured?

A. I wasn't present.

Mr. Horwitz: That is all.

Redirect examination.

By Mr. Rawlins:

Q. It was his duty to operate this motor and keep this coal chute full?

A. Yes, sir.

Q. And the coal put into the chute was used only for the purpose of fueling these engines?

A. Yes.

Mr. Rawlins: That is all.

Mr. Horwitz: That is all.

(Witness excused.)

Mr. Rawlins: Dr. Bohart.

Whereupon Dr. WILLIAM H. BOHART took the stand as a witness in behalf of the respondent and, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rawlins:

Q. Will you state your name, please?

[fol. 98] A. William H. Bohart.

Mr. Rawlins:

Q. Doctor, you are a physician and surgeon?

A. Physician and surgeon.

Q. And you are a physician and surgeon for the Chicago & Eastern Illinois Railroad Company, the——

A. Yes.

Q. —defendant herein?

(No further response.)

Mr. Rawlins:

Q. Did you have occasion to examine Mr. Thomas, the man here, who was injured?

A. I did.

Q. Do you know what his condition was when you first saw him?

A. He had a healed injured right thumb. He had an unhealed injury to the index finger. There was considerable granulated tissue growing out of what probably was—there was a little piece of bone in the hand that was dead.

The Arbitrator:

Q. What date was that?

A. That was December 11, no, 19th of November.

Mr. Rawlins:

Q. What did you do, if anything, for him?

A. Well, we dressed it for several days and finally one day I got a little piece of bone out of the index finger about the size of—just a little piece, I think it was a little larger than the tip of this pencil (indicating), and the finger [fol. 99] healed up.

Mr. Rawlins:

Q. When did it finally heal up?

A. So far as I was concerned, December 16 was the last dressing he had.

Q. Doctor, so far as any other injury was concerned, to the arms, elbows or shoulders describe what, if any injury you found?

A. He didn't complain of any; only the hand.

Q. From the injury that you observed in his hand, the history you got, have you an opinion as to that injury, whether it will cause any permanent disability to the elbow or shoulder?

A. No. There is some from non-use. He has a certain amount of fibrosis in his finger yet, but it don't amount to anything.

Q. What about the elbow or shoulder?

A. Nothing wrong about the elbow or shoulder that I know of.

Q. That condition of the hand from non-use will that improve?

A. Very much.

Mr. Rawlins: I think that is all.

Mr. Horwitz: That is all.

(Witness excused.)

The Arbitrator: Let the record show that both sides [fol. 100] agree and stipulate that the petitioner is to be examined by the Board's physician, who is to make a report to the Arbitrator, the report to become a part of the record and the doctor shall not be subject to cross-examination.

Mr. Rawlins: Yes.

Mr. Cohen: Yes.

Mr. Rawlins: That is all.

(The report referred to by the Arbitrator is as follows—obtained from the file of the Commission:

Copy

"February 24, 1930.

"In re Joe Thomas vs. C. & E. I. Railroad—158,174

"Miss Reid, Office.

"DEAR MISS REID: This man gives the history of being injured July 15th, 1929, when the right hand was caught in some gears.

"Examination today shows an amputation of the distal phalanx of the right thumb. The amputation stump is well healed and not particularly sensitive. Motions at the phalangeal metacarpal articulation are good. There is an amputation of the distal phalanx of the 1st finger. There [fol. 101] is only about 1/3 the normal motion in the proximal articulation of this finger. The 2nd finger shows an amputation of practically the entire distal phalanx. In this finger there is also only about 1/3 the normal motion at the proximal articulation. He is able to flex the tip of the 3rd finger to within about ½ inch of the palm and the tip of the 4th finger to within about ¼ inch of the palm. Motions of the wrist are good. Motions of the elbow are good.

"Conclusions

"The temporary disability has terminated and at this time there is 50% loss of use of the right thumb; about 75% loss of use of the 1st finger; ⅔ loss of use of the 2nd finger; about 15% loss of use of the 3rd finger and about 10% loss of use of the 4th finger. The disability in the thumb is permanent but that in the other fingers should decrease slightly with further use.

"Respectfully submitted.

(Signed) Ira B. Robertson, Medical Director.

"LBR:mb."

Which were all the proceedings had at the hearing of the [fols. 102 & 103] above-entitled cause.

Transcript approved.

J. W. Horwitz, Attorneys for the Petitioner. Edward W. Rawlins, Attorney for the Respondent.

[fols. 104 & 104a] Form 18-A

BEFORE THE INDUSTRIAL COMMISSION OF ILLINOIS

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

DECISION OF ARBITRATOR—Filed Mar. 6, 1930

STATE OF ILLINOIS,
County of Cook, ss:

Notice and application for adjustment of claim having been filed in the above entitled matter, and Harriet Reid having been designated by said Commission as Arbitrator thereof, and said matter having come on to be heard before said Arbitrator at 205 W. Wacker Drive in the City of Chicago, said County and State, on the 24th day of February, 1930; and, after hearing the proofs and allegations of

the parties hereto, and having made careful inquiry and investigation of said matter and being fully advised in the premises, said Arbitrator finds:

That the petitioner and the respondent were not on the 15th day of July, 1929, operating under the provisions of the Workmen's Compensation Act; that on the date last above mentioned said petitioner sustained accidental injuries which did arise out of and in the course of the employment; and that notice of said accident was given said respondent and claim for compensation on account thereof was made on said respondent within the time required under the provisions of said Act.

That the earnings of the petitioner during the year next preceding the injury were $1,474.20, and that the average weekly wage was $28.35.

That petitioner at time of injury was — years of age and had 3 children under 16 years of age.

That necessary first aid, medical, surgical and hospital services have been provided by the respondent herein.

That said cause is hereby dismissed for want of jurisdiction.

(Erie Railroad vs. Collins, 253 W. S. 790.)

Dated and entered this 6th day of March, 1930.

Harriett Reid, Arbitrator.

[fol. 105] New address: 205 W. Wacker Drive, Chicago, Ill.

STATE OF ILLINOIS INDUSTRIAL COMMISSION, 205 W. WACKER DRIVE, CHICAGO, ILL.

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

NOTICE OF DECISION OF ARBITRATOR—March 10, 1930

To Petitioner, through J. W. Horwitz, 10 S. La Salle St., Chicago, Illinois; to Respondent, through Edward W. Rawlins, 105 S. La Salle St., Chicago, Ill., Room 920:

Take notice that on the 6th day of March, 1930, there was filed with the Industrial Commission, at Chicago, Illinois, the decision of the Arbitrator in the above entitled matter, a copy of which decision is enclosed to you herewith; and

You are further notified that unless a petition for review is filed by you with the Industrial Commission within fifteen (15) days after receipt by you of this notice and copy of such decision, and an agreed statement of the facts appearing upon the hearing before the Arbitrator or a correct transcript of evidence of the proceedings at such hearing within twenty (20) days, then and in that event the decision of the said Arbitrator shall be entered of record by this Commission as the decision of the Industrial Commission.

Dated at Chicago, Illinois, this 10th day of March, 1930.

Industrial Commission of Illinois, by Walter F. Rohm, Secretary. (Seal.)

[fols. 106 & 107] Report of medical director omitted; printed side page 100 ante.

[fols. 108 & 109] And, afterwards, to-wit, on the 13th day of March A. D. 1930, there was filed in the offices of the Industrial Commission of Illinois, by the Applicant herein, Receipt for Decision of Arbitrator, which said receipt is in words and figures as follows, to-wit:

Case Number 158,174

Received of Industrial Commission of Illinois:

1. Notice of Hearing on Arbitration.
2. Decision of Arbitrator. J. W. Horwitz.
3. Notice of Hearing on Review.
4. Decision on Review.
5. Notice of Hearing on 19 (h).
6. Dismissal Order.

Date: 3-13-30.

[fols. 110 & 111] (File Original Only. No Duplicates Required)

STATE OF ILLINOIS, INDUSTRIAL COMMISSION, 300 W. ADAMS ST., CHICAGO, ILL.

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

PETITION FOR REVIEW OF DECISION OF ARBITRATOR—Filed Mar. 18, 1930

STATE OF ILLINOIS,
County of Cook, ss:

Now comes Joe Thomas, of Chicago Heights, Ill., and respectfully petitions the Honorable Industrial Commission of the State of Illinois as follows:

That said Commission shall review the decision of the arbitrator, duly appointed according to law, in the above entitled cause, which decision of said arbitrator was filed with the Industrial Commission on the 6th day of March, 1930.

Your petitioner represents that an agreed statement of facts or correct transcript of evidence of the proceedings before said arbitrator will be filed by your petitioner as required by law.

Your petitioner further represents that said decision of the arbitrator should be reviewed by the Industrial Commission, for the following reasons, to wit (set up any proper ground for review, in accordance with Sec. 19 of the Workmen's Compensation Act): That the decision is contrary to the law and the evidence.

Your petitioner therefore prays that proper notice in accordance with the statute may be given to the parties interested herein and that a date may be set by the Honorable Industrial Commission for a hearing upon this peti-

tion for review, and that upon such hearing said Commission may modify or vacate the order and decision of the arbitrator, as in the opinion of said Commission the facts and circumstances shall warrant.

And your petitioner will ever pray.

Joe Thomas, (Employer or employee, as the case may be). J. W. Horwitz, Attorney

Address: 10 S. La Salle St.

[File endorsement omitted.]

[fols. 112 & 113] STATE OF ILLINOIS, INDUSTRIAL COMMISSION OF ILLINOIS, 205 W. WACKER DRIVE, CHICAGO, ILLINOIS

No. 158,174

JOE THOMAS, Applicant,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

MOTION FOR ORDER EXTENDING TIME—Mar. 18, 1930

The petitioner herein respectfully moves the Honorable Industrial Commission to enter an order extending the time for filing stenographic report or agreed statement of facts 30 days, in addition to time allowed by statute.

J. W. Horwitz, Attorney for Joe Thomas.

Dated this 18th day of March, 1930.

Approved March 18th, 1930.

Industrial Commission of Illinois, by C. A. Pense, Member.

Filed with the Industrial Commission March —, 1930, by Walter F. Rohm, Secretary.

[fols. 114 & 115] STATE OF ILLINOIS, BEFORE THE INDUSTRIAL COMMISSION

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

NOTICE OF HEARING ON REVIEW—April 26, 1930

Pet., thru J. W. Horwitz, 10 So. La Salle St., Chicago, Illinois; Resp., thru Edward W. Rawlins, 105 So. La Salle St., Chicago, Illinois:

You and each of you are hereby notified that the above entitled cause is set for hearing on review before the Industrial Commission of Illinois on Monday, the 19th day of May, A. D. 1930, at the hour of 2:00 o'clock P. M., at 205 W. Wacker Drive, in the city of Chicago, Illinois, at which time and place you may appear and be heard in said cause and present to the Industrial Commission such additional testimony as you may desire, upon giving to the opposite party five days' notice of the substance of such additional testimony

Dated at Chicago, Illinois, this 26th day of April, 1930.

Industrial Commission of Illinois, by Walter F. Rohm, Secretary.

[fols. 116 & 117] STATE OF ILLINOIS, BEFORE THE INDUSTRIAL COMMISSION

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

NOTICE OF HEARING ON REVIEW—May 20, 1930

Pet., thru J. W. Horwitz, 10 S. La Salle St., Chicago, Illinois; Resp., thru Edward R. Rawlins, 105 So. La Salle St., Chicago, Ill.:

You and each of you are hereby notified that the above entitled cause is set for hearing on review before the Indus-

trial Commission of Illinois, on Thursday, the 26th day of June, A. D. 1930, at the hour of 1:30 o'clock P. M., at 205 W. Wacker Drive, in the city of ——, Illinois, at which time and place you may appear and be heard in said cause and present to the Industrial Commission such additional testimony as you may desire, upon giving to the opposite party five days' notice of the substance of such additional testimony.

Dated at Chicago, Illinois, this 20th day of May, 1930.

Industrial Commission of Illinois, by Walter F. Rohm, Secretary.

[fol. 118] [File endorsement omitted]

BEFORE THE INDUSTRIAL COMMISSION OF ILLINOIS

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

STATEMENT OF PROCEEDINGS ON REVIEW—Filed Aug. 6, 1930

Be it remembered that heretofore, to-wit, on the 26th day of June, A. D. 1930, the above entitled cause came on for hearing on review before Commissioner Peter Grieve, Jr., at the office of the Industrial Commission, Chicago, Illinois.

Whereupon the following proceedings were had, and this record made.

Appearances:

Mr. J. W. Horwitz and Mr. B. E. Cohen, Attorneys for Petitioner.

Mr. Edward R. Rawlins, Attorney for Respondent.

Abe Levin, Reporter.

[fols. 119 & 120] The Commissioner: Is there any additional testimony?

Mr. Rawlins: No; I think the facts are clear enough in the record so they cover our controversy.

Mr. Horwitz: On the record and some argument.
The Commissioner: All right; proceed.

(Whereupon a discussion was had by respective counsel, not for the record.)

Which were all the proceedings had and record made at this hearing on review.

Transcript correct.
J. W. Horwitz, J. S. Bloom, Attorney for Petitioner.
Edward W. Rawlins, Attorney for Respondent.

[fol. 121] BEFORE THE INDUSTRIAL COMMISSION OF ILLINOIS

No. 158,174

JOE THOMAS, Petitioner,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

DECISION—July 8, 1930

Petition to review the award of the Arbitrator having been filed by the Petitioner herein, and due notice given, the above entitled cause came on for hearing before the Commission, at Chicago, Illinois, on the 26th day of June, 1930.

Upon a consideration of the record herein, and further proceedings had on review, the Commission is of the opinion the award of the Arbitrator is erroneous; said award is therefore hereby set aside, and the following decision is hereby substituted in its stead:

The Commission finds:

First. That the petitioner and respondent were on the 15th day of July, 1929, operating under the provisions of the Workmen's Compensation Act; that on the date last above mentioned said petitioner sustained accidental injuries which did arise out of and in the course of the employment; that notice of said accident was given said respondent and claim for compensation on account thereof

was made on said despondent within the time required under the provisions of said Act.

[fol. 122] Second. That the earnings of the petitioner during the year next preceding the injury were $1474.20, and that the average weekly wage was $28.35.

Third. That Petitioner at time of injury had three children under sixteen years of age.

Fourth. That necessary first aid, medical, surgical and hospital services have been provided by the respondent herein.

Fifth. That as a result of said accidental injury the petitioner was temporarily totally incapacitated for work for a period of 27 2/7 weeks.

Sixth. That as a further result of said injury, the petitioner sustained the permanent loss of use of 50% of the right thumb, 75% of the right first finger, 66⅔% of the second finger, 15% of the third finger, and 10% of the fourth finger.

It is therefore ordered by the Commission that the respondent pay to the petitioner compensation at the rate of $18.00 per week for a period of 27 2/7 weeks, that being the period of temporary total incapacity for work.

It is further ordered by the Commission that the respondent pay to the petitioner the further sum of $18.00 per week for a period of 94 1/12 weeks, for the reason that injury sustained caused the permanent loss of use of 50% of the right thumb, 75% of the first finger, ⅔ of the 2nd finger, 15% of the third finger, and 10% of the Fourth [fol. 123] finger.

Bond for removal of this cause to the Circuit Court by the respondent is hereby fixed at the sum of $2400.00, and the probable cost of the record to be filed as a return to writ of certiorari is the sum of $30.00.

Dated this 8th day of July, A. D. 1930.

P. Grieve, Jr., Clarence S. Piggott, H. H. Willoughby, Industrial Commission of Illinois.

[fols. 124 & 125] And afterwards, to-wit, on the 11th day of July, A. D. 1930, there was filed in the offices of the Industrial Commission of Illinois, by the Respondent herein, receipt for decision on review, which said receipt is in words and figures as follows, to-wit:

Case Number: 158,174

Received of Industrial Commission of Illinois:
1. Notice of Hearing on Arbitration.
2. Decision of Arbitrator.
3. Notice of Hearing on Review.
4. Decision on Review. Edward W. Rawlins, M. Agle.
5. Notice of Hearing on 19 (h).
6. Dismissal Order.

Date: Month: July; day, 11, 1930.

[fols. 126 & 127] STATE OF ILLINOIS:

INDUSTRIAL COMMISSION OF ILLINOIS, 205 W. WACKER DRIVE, CHICAGO, ILLINOIS

No. 158,174

JOE THOMAS, Applicant,

vs.

CHICAGO & EASTERN ILLINOIS R. R. Co., Respondent

MOTION FOR ORDER EXTENDING TIME—July 25, 1930

The respondent herein respectfully moves the Honorable Industrial Commission to enter an order extending the time for filing stenographic report on review or agreed statement of facts thirty days, in addition to time allowed by statute.

Edward W. Rawlins, Attorney for Respondent.

Dated this 25th day of July, 1930. (Writ.)

[fol. 128] WRIT OF CERTIORARI UNDER WORKMEN'S COMPENSATION ACT—Filed July 29, 1930

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to Industrial Commission, Greeting:

Whereas, it has been represented to our Circuit Court of Cook County, by the Præcipe or Petition of Chicago & Eastern Illinois R. R. Co., filed in said Court, that on the 8th day of July, A. D. 1930, in a certain suit or proceeding, then pending before you, a decision or award has been rendered by you in favor of Joe Thomas and against said Chicago & Eastern Illinois R. R. Co. for $18.00 per week for a period of 27-2/7 weeks, and $18.00 per week for a period of 94 1/12 weeks;

And the said Chicago & Eastern Illinois R. R. Co. having filed a Præcipe or Petition for a Writ of Certiorari and we being willing that said cause should be brought before our said Circuit Court;

Do Therefore Command You that, without delay, you certify to our said Circuit Court of Cook County, a transcript of the decision or award and other proceedings had before you in said cause on or before the third Monday of August, A. D. 1930.

To the Sheriff of said County to execute and return in due form of law.

Witness Thomas O. Wallace, Clerk of our said Circuit Court of Cook County, and the Seal of said Court at Chicago, this — day of July, A. D. 1930.

—— ——, Clerk.

[File endorsement omitted.]

[fols. 129 & 130] Secretary's certificate to foregoing transcript omitted in printing.

[fols. 131 & 132] IN CIRCUIT COURT OF COOK COUNTY

No. B-203,860

CHICAGO & EASTERN ILLINOIS R. R. Co., Petitioner,

vs.

JOE THOMAS and INDUSTRIAL COMMISSION OF ILLINOIS, Respondents

JUDGMENT—Dec. 31, 1930

This cause coming on to be heard on writ of certiorari upon the application of Chicago & Eastern Illinois R. R. Co., to review the decision and award of the Industrial Commission of the State of Illinois, and the Court having inspected the record returned by the said Industrial Commission in response to the writ of certiorari, and having heard the arguments of counsel, and being fully, advised in the premises, finds no errors of law appearing on the said record, and,

It is, therefore, ordered, adjudged and considered by the Court, that the decision of the Industrial Commission of the State of Illinois entered by the said Commission on the 8th day of July, A. D. 1930, be and the same is hereby in all things confirmed, to which action of the Court the Petitioner herein, the Chicago & Eastern Illinois R. R. Co., excepts.

Enter. H. Sterling Pomeroy, Judge of the Circuit Court of Cook County.

Dated this 31st day of December, A. D. 1930.

Compared.

[fols. 133 & 134] IN SUPREME COURT OF ILLINOIS

No. 20704. B 203,860

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,
Petitioner,

v.

INDUSTRIAL COMMISSION OF ILLINOIS et al.; JOE THOMAS,
Respondent

Application for Writ of Error to Circuit Court Cook

ORDER DENYING WRIT OF ERROR—Filed in Circuit Court Feb. 27, 1931

February 18, A. D. 1931.

And now on this day the Court having duly considered the petition for a Writ of Error herein as well as the record and abstract filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a Writ of Error herein.

And it is further considered by the Court that the said respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois and keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said Supreme Court at Springfield, in said State, this 26th day of February in the year of our Lord one thousand nine hundred and Thirty-one.

Chas. W. Vail, Clerk of the Supreme Court. (Seal.)

Compared.

[fol. 135] IN CIRCUIT COURT OF COOK COUNTY

[Title omitted]

ORDER STAYING PROCEEDINGS—Mar. 4, 1931

This cause coming on to be heard on motion of Chicago & Eastern Illinois R. R. Co., petitioner in the above entitled cause (Respondent before the Industrial Commission) and the Court being advised in the premises, it is hereby ordered that all further proceedings in said cause be and the same are hereby stayed until the time within which said petitioner, Chicago & Eastern Illinois R. R. Co., is required to file its petition for certiorari in the Supreme Court of the United States to review the Judgment and order of this Court in said cause shall have expired without any such petition having been filed or if filed until same has been passed upon by the Supreme Court of the United States.

Enter.

H. Sterling Pomeroy, Judge.

[fol. 136] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 137] Judgment of Supreme Court omitted; printed side page 133 ante.

[fol. 138] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Chicago & Eastern Illinois R. R. Co., petitioner herein, by Edward W. Rawlins, its counsel, and in connection with its petition for a writ of certiorari, says that in the record, proceedings, and in the final order and judgment aforesaid, manifest error has intervened to the prejudice of the petitioner, and this petitioner here assigns the following errors, to wit:

1. The Industrial Commission of the State of Illinois was [fol. 139] without jurisdiction of the case.

2. The Circuit Court of Cook County, Illinois erred in not finding that the claimant Joe Thomas (respondent herein) was at the time he sustained the injuries in question engaged in work in interstate commerce.

3. The Industrial Commission of Illinois erred in not finding that the claimant Joe Thomas (respondent herein) was at the time he sustained the injuries in question engaged in work in interstate commerce.

4. The Circuit Court of Cook County, Illinois erred in not finding that the Industrial Commission of Illinois was without jurisdiction of the case.

5. The Circuit Court of Cook County, Illinois erred in not holding that the Industrial Commission of Illinois was without jurisdiction of the case because the undisputed evidence shows that the claimant Joe Thomas (respondent herein) was at the time he sustained the injuries in question, engaged in work in interstate commerce.

6. The finding and order of the Circuit Court of Cook County, Illinois affirming the decision of the Industrial Commission of Illinois are contrary to the evidence in the case.

7. The finding and order of the Circuit Court of Cook County, Illinois affirming the decision of the Industrial Commission of Illinois are contrary to the law.

8. The Circuit Court of Cook County, Illinois erred in not reversing the decision of the Industrial Commission of [fol. 140] Illinois.

9. The Circuit Court of Cook County, Illinois erred in not quashing the proceedings, record and award of the Industrial Commission of Illinois.

Chicago & Eastern Illinois R. R. Co., by Edward W. Rawlins, Its Counsel. Edward W. Rawlins, Counsel for Chicago & Eastern Illinois R. R. Co., Petitioner.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1931

The petition herein for a writ of certiorari to the Circuit Court of Cook County, State of Illinois, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1275)

FILE COPY

MAY 11 1931

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 979

CHICAGO & EASTERN ILLINOIS R. R. CO.,
PETITIONER,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS. AND
JOE THOMAS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

EDWARD W. RAWLINS,
Counsel for Petitioner.

T. P. LITTLEPAGE,
Of Counsel.

(35,881)

INDEX.

Subject Index.

	Page
Statement	1
Facts	2
Proceedings before industrial commission and courts of the State of Illinois	5
Questions involved: Whether the right of action, if any, of a railroad employee who was injured while operating or caring for a coal chute and motor connected therewith, which are regularly and constantly used for coaling engines used indiscriminately in interstate and intrastate commerce, is governed by the Federal Employers' Liability Act or by the Workmen's Compensation Act of the State wherein the injury occurred	6
Reasons for granting writ of certiorari	7
Prayer	8

Table of Cases and Statutes Cited.

Cases Cited.

American Railway Express Co. v. Levee, 263 U. S., 19	2
Erie R. Co. v. Collins, 253 U. S., 77	5, 7, 9, 10
Erie R. Co. v. Collins, 259 Fed., 172	9
Erie R. Co. v. Szary, 253 U. S., 86	7, 9
Erie R. Co. v. Winfield, 244 U. S., 170	4, 7, 9
New York Central R. Co. v. Winfield, 244 U. S., 147	7, 9
So. Pac. Co. v. Industrial Accident Commission, 251 U. S., 259	7, 9
Toledo, St. Louis & Western R. Co. v. Slavin, 236 U. S., 454	9
Western Union Telegraph Co. v. Crovo, 220 U. S., 364	2

Statutes Involved.

Workmen's Compensation Act of the State of Illinois (Smith-Hurd Illinois Revised Statutes, 1929, Chap. 48, Sec. 19 (*f*) (2), pp. 1423, 1430)	6
Federal Employers' Liability Act (Mason's United States Code, 1926, Vol. 3, page 3064).	

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 959

CHICAGO & EASTERN ILLINOIS R. R. CO.,
PETITIONER,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS AND JOE THOMAS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Chicago & Eastern Illinois R. R. Co., prays for a writ of certiorari to review the order and judgment of the Circuit Court of Cook County, Illinois, entered December 31, 1930 (R. 73), confirming an award of the Industrial Commission of Illinois

in favor of the respondent, Joe Thomas, and against the petitioner in the above-entitled cause, on account of personal injuries sustained by said Joe Thomas while in the employ of petitioner.

Application was made by petitioner to the Supreme Court of Illinois to review said order and judgment of the Circuit Court of Cook County, Illinois, on writ of error (discretionary with the Supreme Court of Illinois), which application was denied by the Supreme Court of Illinois February 18, 1931 (R. 74), thus rendering said order and judgment of the Circuit Court of Cook County final and making said Court the highest Court in the State of Illinois in which a decision could be had. (*Western Union Telegraph Co. v. Crovo*; 220 U. S., 364; 55 Law Ed., 498; *American Railway Express Co. v. Levee*, 263 U. S. 19; 68 Law Ed., 140.)

Facts.

Petitioner is an interstate railroad, with its lines extending into the States of Indiana, Illinois and Missouri (R. 44). On July 15, 1929, the date of the happening of the injuries in question to respondent, he was in the employ of petitioner in the terminal switch-yard at Chicago Heights, Illinois (R. 13, 37, 56), his duties consisting of caring for and operating a coal-chute and electric motor used in connection therewith, and taking care of a round-house and cinder-pit in said yard (R. 20, 21, 38, 59). It was his regular daily duty to keep said coal-chute filled with coal (R. 20, 21, 24), which he did by hoisting same from the ground into the chute by means of the electric motor connected therewith (R. 22-23, 57), and he also frequently coaled

and watered the engines hereinafter referred to (R. 24). Said coal-chute and motor had been in operation at the same place for many years (R. 27) and were entirely separate from the round-house and located about three hundred feet distant therefrom (R. 54). On the day in question respondent, in the course of his regular duties (R. 15, 24), went to the coal-chute for the purpose of filling it with coal, and started the engine running for the purpose of hoisting coal into the chute, and while it was running attempted to grease it from underneath and got his hand caught in the gears, causing the injuries in question (R. 15, 22). Said gears were protected from above by a hood (R. 26). All of the coal which respondent hoisted into said chute was used for coaling the switch-engines which operated in and around said terminal yard (R. 23, 59). There were five engines which regularly operated in said yard and coaled at this particular chute (R. 27, 56). Four were regular switch-engines, referred to as Chicago Heights Terminal engines (R. 26, 38), and one larger engine, referred to as the C. & E. I. engine. These engines were regularly used in moving freight which was brought into and shipped out of the industries at Chicago Heights (R. 23), which surrounded said terminal yard; and the undisputed evidence shows that seventy-five per cent of said freight was interstate freight (R. 43), and all of the freight which passed through said yard was handled by said engines, which worked every day (R. 27).

There were sixty-five industries which were served by said engines and from said terminal yard (R. 40),

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which said yard connected with a number of railroads, viz., Chicago, Milwaukee & St. Paul, Michigan, B. & O. C. T., and C. & E. I. (R. 39), and the switch-engines above referred to would regularly take the freight which was brought into Chicago Heights by said railroads and deliver same to the various industries, and in turn switch manufactured goods from said industries back to said connecting lines (R. 38, 39, 23). As above stated, it is undisputed that approximately seventy-five per cent of the freight handled from day to day in said terminal yard and by said engines was interstate commerce (R. 43). In short, the evidence shows that the coal-chute and motor in question which respondent was operating at the time he was injured was regularly used for the purpose of fueling said engines, which were constantly and regularly engaged indiscriminately in both intra- and interstate commerce; and the coal which was being hoisted by said respondent into said coal-chute was all used in said engines.

Petitioner contends that, under the facts in this case, respondent, at the time of the happening of the injuries in question, was engaged in work in interstate commerce, and that therefore the Circuit Court of Cook County, Illinois, erred in not holding that the Industrial Commission of Illinois was without jurisdiction of the case, because respondent's right of action, if any, is governed by the Federal Employers' Liability Act and not by the Workmen's Compensation Act of Illinois. (See *Erie R. R. Co. v. Winfield*, 244 U. S., 170; 61 Law Ed., 1057.)

Proceedings Before the Industrial Commission and Courts of the State of Illinois.

This action was commenced by respondent by the filing of an application for adjustment of claim with the Industrial Commission of Illinois on January 18, 1930 (R. 7), under which he sought to recover compensation in accordance with the Workmen's Compensation Act of Illinois on account of said injuries. Hearing was had before an Arbitrator appointed by said Commission, and upon said hearing it was stipulated that one of the questions involved was the question as to whether, at the time of the injuries to respondent, petitioner and respondent were operating under the provisions of the Workmen's Compensation Act of Illinois or the Federal Employers' Liability Act (R. 12-13).

The Arbitrator rendered a decision March 6, 1930 (R. 62-63), dismissing the case for want of jurisdiction, said decision being based on the theory that, at the time of the happening of the accident, respondent was engaged in work in interstate commerce, and, therefore, the Industrial Commission of Illinois was without jurisdiction. In rendering said decision the Arbitrator cited and followed the decision of this Court in *Erie R. Co. v. Collins*, 253 U. S. 77 (R. 63), which case we beg to suggest is, we think, conclusive as to the question presented.

On March 18, 1930 (R. 65), respondent filed petition for a review of the award of the Arbitrator with the Industrial Commission, and on July 8, 1930, said Commission reversed said decision of the Arbitrator

and awarded compensation to the respondent in an amount aggregating $2,184.64 (R. 69). Petitioner sued a writ of certiorari out of the Circuit Court of Cook County, Illinois, on July 28, 1930 (R. 1), to review said award of the Industrial Commission, and, as above stated, the Circuit Court confirmed said award on December 31, 1930 (R. 73).

Under the statutes of Illinois the only method by which judgments or orders of the Circuit Court in such cases can be reviewed is upon writ of error to the Supreme Court (Smith-Hurd Illinois Revised Statutes, 1929, Chap. 48, Sec. 19 (*f*) (2), pp. 1423, 1430). Said section is, in part, as follows:

> "Judgments or orders of the Circuit Court under this Act shall be reviewed only by the Supreme Court upon a writ of error which the Supreme Court in its discretion may order to issue. * * *"

In accordance with the provisions of said statutes, petitioner filed a petition for writ of error in the Supreme Court of Illinois, which petition said Court denied on February 8, 1931 (R. 74).

Question Involved.

The question presented is whether the right of action, if any, of a railroad employee who was injured while operating or caring for a coal-chute and motor connected therewith, which are regularly and constantly used for coaling engines used indiscriminately in interstate and intrastate commerce, is governed by the Federal Employers' Liability Act or by the Work-

men's Compensation Act of the States wherein the injury occurred.

Reasons for Granting Writ of Certiorari.

I.

The judgment and order of the Circuit Court affirming the award of the Industrial Commission is in direct conflict with the decisions of this Court, including *Erie R. R. Co. v. Collins*, 253 U. S., 77; 64 Law Ed., 790; *Erie R. R. Co. v. Szary*, 253 U. S., 86; 64 Law Ed., 791, and *Southern Pacific Company v. Industrial Accident Commission*, 251 U. S., 259; 64 Law Ed., 258, in which this Court has held, under facts to all intents and purposes similar, that the injured employee was engaged in work in interstate commerce. Said order and judgment of the Circuit Court of Cook County, Illinois, is also in conflict with the decisions of this Court in *New York Central v. Winfield*, 244 U. S. 147; 61 Law Ed., 1045, and *Erie R. R. Co. v. Winfield*, 244 U. S., 170; 61 Law Ed., 1057, in which this Court has held that where an employee is engaged indiscriminately in both intra- and interstate commerce at the time of an injury the Federal Employers' Liability Act, and not the State Compensation Act, applies.

II.

The question raised is in no sense a technical one, because if, as petitioner contends, respondent was, at the time he was injured, in work in interstate commerce, then the order and judgment of the Circuit

Court was not only erroneous, but prejudicial, to the petitioner; for under the Employers' Liability Act petitioner could urge as a defense that it was not guilty of negligence and also that the injury was the result of a risk assumed by respondent, which could not be done under the Illinois Workmen's Compensation Act.

Your petitioner therefore respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Cook County, Illinois, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings in said Circuit Court of Cook County, Illinois, in this cause entitled "Joe Thomas *versus* Chicago & Eastern Illinois, Gen. No. B-203, 860," to the end that this cause may be reviewed and determined by this Honorable Court, and that the said order and judgment of the Circuit Court of Cook County, Illinois, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

CHICAGO & EASTERN ILLINOIS R. R. CO.,

By EDWARD U. RAWLINS,

Its Counsel.

T. P. LITTLEPAGE,

Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Where the work at which a railroad employee is engaged at the time of his injuries is work in interstate commerce, the employee is not entitled to compensation under the State's Workmen's Compensation Act, but his remedy, if any, is under the Federal Employers' Liability Act.

Erie R. R. Co. v. Winfield, 244 U. S. 170; 61 Law Ed., 1057.

New York Central v. Winfield, 244 U. S. 147; 61 Law Ed., 45.

Toledo, etc. & Western R. R. Co. v. Slavin, 236 U. S., 454; 59 Law Ed., 671.

So. Pac. Co. v. Industrial Accident Commission, 251 U. S., 259; 64 Law Ed., 258.

II.

An employee of a railroad company engaged in caring for or operating a coal-chute and motor connected therewith which are regularly and constantly used for the purpose of coaling engines used indiscriminately in interstate and intrastate commerce, as was respondent in the case at bar, is engaged in work in interstate commerce.

Erie R. Co. v. Collins, 253 U. S., 77; 64 Law Ed., 790.

Erie R. R. Co. v. Collins, 259 Fed., 172.

Erie R. Co. v. Szary, 253 U. S., 86; 64 Law Ed., 794.

So. Pac. Co. v. Industrial Accident Commission, 251 U. S., 259; 64 Law Ed., 258.

The case of *Erie R. Co. v. Collins*, 253 U. S., 77; 64 Law Ed., 790, *supra*, is, we think, directly in point. In that case the plaintiff, Collins, was hurt by starting a gasoline-engine which pumped water into a tank which supplied water to *both interstate and intrastate trains*. It appeared that the plaintiff was not familiar with starting the engine and it exploded by reason of the fumes of the gasoline being ignited by a lantern or fire. In that case this Court held that the plaintiff, at the time of the happening of the injury, was engaged in interstate commerce.

There is no material difference between the facts in the *Collins* case and those in the case at bar. In the *Collins* case the injured man was starting the engine for the purpose of pumping water into a tank, which water was later to be used in watering engines used both in interstate and intrastate commerce, while in the case at bar, claimant was greasing the engine which he had started running for the purpose of hoisting coal into the chute, which coal was later to be used in coaling engines engaged in both interstate and intrastate commerce.

In the course of its opinion, this Court, stated, p. 85:

> "In the Pedersen Case it was said that the questions which naturally arise: 'Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?' Or, as said in *Shanks v. Delaware, L. & W. R. Co., supra*, 'was the work so closely related to it (interstate commerce) as to be practically a part of it?' The answer must be

in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes, therefore, within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as was demanded, and the test of the cases satisfied."

Respectfully submitted,

EDWARD U. RAWLINS,
Counsel for Petitioner.

T. P. LITTLEPAGE,
Of Counsel.

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CHARLES ELMO

IN THE

Supreme Court of the United States

October Term, A. D. 1931

No. 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,

Respondents.

Brief and Argument for Petitioner.

EDWARD W. RAWLINS,

Counsel for Petitioner.

T. P. LITTLEPAGE,

Of Counsel.

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HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

INDEX.

Subject Index.

	PAGE
Jurisdiction	1-3
Argument	9
Statement of the case	4
Specification of errors relied upon	6
Ultimate question	6

Summary of Points Presented:

I. An employee of a railroad company engaged in caring for or operating a coal chute and motor connected therewith which are regularly and constantly used for the purpose of coaling engines used indiscriminately in interstate and intrastate commerce, as was respondent in the case at bar, is engaged in work in interstate commerce 7

II. Where the work at which a railroad employee is engaged at the time of his injuries is work in interstate commerce, the employee is not entitled to compensation under the State's Workmen's Compensation Act, but his remedy, if any, is under the Federal Employers' Liability Act 7

Table of Cases and Statutes Cited.

Cases Cited.

American Railway Express Co. v. Levee, 263 U. S. 19.. 3

Erie R. R. Co. v. Collins, 253 U. S. 77 .....2, 7, 9

Erie R. R. Co. v. Collins, 259 Fed. 172 .....7, 10

Erie R. R. Co. v. Szary, 253 U. S. 86 .....7, 14

Erie R. R. Co. v. Winfield, 244 U. S. 170 .....2, 6, 7, 14

Horton v. Oregon W. R. & N. Co., 130 Pac. 897, 901.....7, 12

Kelly v. Erie R. R. Co., 188 App. Div. 83, 177 N. Y. Supp. 278, 279 13

Minneapolis, etc. R. Co. v. Rock, 279 U. S. 410-12 3

New York Central v. Winfield, 244 U. S. 147.....7, 14

Rousch v. B. & O. R. R. Co., 243 Fed. 712 .....7, 11

PAGE

Sells v. Grand Trunk Ry. Co., 206 Ill. App. 45, 51 13

So. Pac. Co. v. Industrial Accident Commission, 251 U. S. 259 ..... 7, 8, 14

Toledo, etc. & Western R. R. Co. v. Slavin, 236 U. S. 454 ..... 8, 14

Western Union Telegraph Co. v. Crovo, 220 U. S. 364 3

STATUTES CITED.

Federal Employers' Liability Act (Mason's United States Code, 1926, Vol. 3, p. 3064), 35 Stat. 65, Chap. 149 8

Workmen's Compensation Act of the State of Illinois (Smith-Hurd Illinois Revised Statutes, 1929, Chap. 48, pp. 1423, 1425, 1427, 1430) 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1931

No. 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,

Respondents.

BRIEF AND ARGUMENT FOR PETITIONER.

This case is here pursuant to writ of certiorari to the Circuit Court of Cook County, Illinois, granted on application of the Chicago & Eastern Illinois R. R. Co., (hereinafter referred to as petitioner).

There are no reported opinions or decisions of the lower courts in the case.

This action was commenced by the respondent, Joe Thomas, by the filing of an application for adjustment of claim with the Industrial Commission of Illinois, January 18, 1930 (R. 7), under which he sought to recover compensation in accordance with the provisions of the Workmen's Compensation Act of Illinois on account of personal

injuries sustained by him while in the employ of petitioner at Chicago Heights, Illinois.

The defense of petitioner to said action depends and is based upon the Federal Employers' Liability Act (Mason's U. S. Code, 1926, Vol. 3, Page 3064) 36 Stat. 65, Chap. 149. It is petitioner's contention that at the time of the happening of the injuries in question, respondent was engaged in work in interstate commerce, and that, therefore, the Industrial Commission of Illinois was without jurisdiction of the case as the rights of the parties were governed by the Federal Employers' Liability Act and not the Workmen's Compensation Act of Illinois.

Erie R. R. Co. v. *Winfield,* 244 U. S. 170.

Hearing was had before an Arbitrator appointed by said Industrial Commission (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 48, p. 1423 (*a*)), and upon said hearing it was stipulated that one of the questions in dispute was the question as to whether at the time of the injuries to respondent, the parties were operating under the provisions of the Workmen's Compensation Act of Illinois or the Federal Employers' Liability Act (R., 12-13).

The Arbitrator rendered decision March 6, 1930 (R. 62-63) in which the Arbitrator held that the parties were not at the time of the happening of the injuries operating under the Workmen's Compensation Act of Illinois and dismissed the petition for want of jurisdiction, said decision being based upon the theory that at the time of the happening of the accident respondent was engaged in work in interstate commerce and that, therefore, the Industrial Commission was without jurisdiction.

In rendering said decision, the Arbitrator cited and followed the decision of this Court in *Erie R. R. Co.* v. *Collins,* 253 U. S. 77 (R. 63).

March 18, 1930 (R. 65) respondent filed petition for a review of the award of the Arbitrator with said Industrial Commission (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 48, page 1425 (*e*)), and on July 8, 1930, said Commission reversed the decision of the Arbitrator and awarded compensation to the respondent in an amount aggregating $2184.64 (R. 69).

Petitioner sued a writ of error out of the Circuit Court of Cook County, Illinois on July 28, 1930 (R. 1) to review said decision of the Industrial Commission (Smith-Hurd Ill. Rev. Statute 1929, Chap. 48, p. 1427 (1)), and said Circuit Court confirmed said award December 31, 1930 (R. 73).

Under the Illinois statutes, the only method by which judgments or orders of the Circuit Court in such cases can be reviewed is upon writ of error to the Supreme Court (Smith-Hurd Illinois Revised Statutes, 1929, Chap. 48, p. 1430 (2)). Said statute is in part as follows:

> "Judgments or orders of the Circuit Court under this Act (Compensation Act) shall be reviewed only by the Supreme Court upon a writ of error which the Supreme Court in its discretion may order to issue."

Petitioner filed petition for writ of error in the Supreme Court of Illinois to review the judgment and order of the Circuit Court in said case, which petition was denied by the Supreme Court February 8, 1931 (R. 74), thus making the order and judgment of the Circuit Court of Cook County, Illinois final, and making said Court the highest Court in the State of Illinois in which a decision could be had.

Western Union Telegraph Co. v. *Crovo,* 220 U. S. 364;

American Railway Express Co. v. *Levee,* 263 U. S. 19;

Minneapolis, etc. R. Co. v. *Rock,* 279 U. S. 410-12.

STATEMENT OF THE CASE.

As to the material facts there is no dispute.

Petitioner is an interstate railroad, with its lines extending into the States of Indiana, Illinois and Missouri (R. 44). On July 15, 1929, the date of the happening of the injuries in question to respondent, he was in the employ of petitioner in the terminal switchyard at Chicago Heights, Illinois (R. 13, 38, 56), his duties consisted of caring for and operating a coal chute and electric motor used in connection therewith, and taking care of a roundhouse and cinder-pit in said yard (R. 20, 21, 38, 59). It was his regular daily duty to keep said coal-chute filled with coal (R. 21, 24), which he did by hoisting same from the ground into the chute by means of an electric motor connected therewith (R. 22-23, 57), and he also frequently coaled and watered the engines hereinafter referred to (R. 19, 24). Said coal chute and motor had been in operation at the same place for many years (R. 27) and were entirely separate from the roundhouse and located about three hundred feet distant therefrom (R. 54). On the day in question respondent, in the course of his regular duties (R. 15, 24), went to the coal chute for the purpose of filling it with coal, and started the engine running for the purpose of hoisting coal into the chute, and while it was running attempted to grease it from underneath and got his hand caught in the gears, causing the injuries in question (R. 15, 22). All of the coal which respondent hoisted into said chute was used for coaling the switch-engines which operated in and around said terminal yard (R. 23, 59). There were five engines which regularly operated in said yard and coaled at this particular chute (R. 27, 56). Four were regular switch-engines, referred to as Chicago Heights Terminal engines (R. 56; 38, 39), and one larger engine, referred to as the C. & E. I. engine (R. 56). These engines were regularly used in moving freight which was brought into and shipped out of the industries

at Chicago Heights (R. 23), which surrounded said terminal yard; and the undisputed evidence shows that seventy-five per cent of said freight was interstate freight (R. 43), and all of the freight which passed through said yard was handled by said engines, which worked every day (R. 27).

There were sixty-five industries which were served by said engines and from said terminal yard (R. 40), which said yard connected with a number of railroads, viz., Chicago, Milwaukee & St. Paul, Michigan Central, B. & O. C. T., and C. & E. I. (R. 39), and the switch-engines above referred to would regularly take the freight which was brought into Chicago Heights by said railroads and deliver same to the various industries, and in turn switch manufactured goods from said industries back to said connecting lines (R. 38, 39, 23). As above stated, it is undisputed that approximately seventy-five per cent of the freight handled from day to day in said terminal yard and by said engines was interstate freight (R. 43). In short, the evidence shows that the coal chute and motor in question which respondent was operating at the time he was injured was regularly used for the purpose of fueling said engines, which were constantly and regularly engaged indiscriminately in both intra- and interstate commerce; and the coal which was hoisted by respondent into said coal chute was all used in said engines.

The proceedings had before the Industrial Commission and in the state courts are set forth in detail on pages 1, 2 and 3, *supra,* and we will not repeat them.

It is the contention of petitioner that under the facts in this case, concerning which there can be no material dispute, respondent was at the time of the happening of the injuries in question, engaged in work in interstate commerce and that therefore the Industrial Commission of Illinois was without jurisdiction of the case and the Circuit Court of Cook County, Illinois, erred in not so holding because respondent's right of action, if any, is governed by

the Federal Employers' Liability Act and not by the Workmen's Compensation Act of Illinois (See *Erie R. R. Co.* v. *Winfield*, 244 U. S. 170).

Specification of errors relied upon.

The Industrial Commission of the State of Illinois was without jurisdiction of the case.

The Circuit Court of Cook County, Illinois, erred in not holding that the Industrial Commission of Illinois was without jurisdiction of the case because the undisputed evidence shows that the claimant Joe Thomas (respondent herein) was at the time he sustained the injuries in question, engaged in work in interstate commerce.

The finding and order of the Circuit Court of Cook County, Illinois, affirming the decision of the Industrial Commission of Illinois are contrary to the evidence in the case.

The finding and order of the Circuit Court of Cook County, Illinois, affirming the decision of the Industrial Commission of Illinois are contrary to the law.

The Circuit Court of Cook County, Illinois, erred in not reversing the decision of the Industrial Commission of Illinois.

The Circuit Court of Cook County, Illinois, erred in not quashing the proceedings, record and award of the Industrial Commission of Illinois.

Ultimate question.

The ultimate question, is whether the right of action, if any, of a railroad employee who was injured while operating or caring for a coal chute and motor connected therewith, which was regularly and constantly used in coaling engines used indiscriminately in interstate and intrastate commerce, is governed by the Federal Employers' Liability Act or by the Workmen's Compensation Act of the state wherein the injury occurred.

SUMMARY OF POINTS PRESENTED AND AUTHORITIES.

I.

An employee of a railroad company engaged in caring for or operating a coal chute and motor connected therewith which are regularly and constantly used for the purpose of coaling engines used indiscriminately in interstate and intrastate commerce, as was respondent in the case at bar, is engaged in work in interstate commerce.

Erie R. Co. v. *Collins*, 253 U. S. 77.

Erie R. R. Co. v. *Collins*, 259 Fed. 172.

Erie R. Co. v. *Szary*, 253 U. S. 86.

So. Pac. Co. v. *Industrial Accident Commission*, 251 U. S. 259.

Rousch v. *B. & O. R. R. Co.*, 243 Fed. 712.

Horton v. *Oregon W. R. & N. Co.*, 130 Pac. 897-901.

Sells v. *Grand Trunk Ry. Co.*, 206 Ill. App. 45, 51.

II.

Where the work at which a railroad employee is engaged at the time of his injuries is work in interstate commerce, the employee is not entitled to compensation under the State's Workmen's Compensation Act, but his remedy, if any, is under the Federal Employers' Liability Act.

Erie R. R. Co. v. *Winfield*, 244 U. S. 170.

New York Central v. *Winfield*, 244 U. S. 147.

Toledo, etc. & Western R. R. Co. v. *Slavin*, 236 U. S. 454.

So. Pac. Co. v. *Industrial Accident Commission*, 251 U. S. 259.

Statutes involved.

Federal Employers' Liability Act, (Mason's U. S. Code, Vol. 3, page 3064), 35 Stat. 65, Chap. 149;

Workmen's Compensation Act of Illinois (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 48, pages 1423, 1425, 1427, 1430).

ARGUMENT.

As the record shows, respondent at the time he sustained the injuries complained of, was engaged in operating an electric motor for the purpose of hoisting coal into a coal chute, all of which coal was to be used in fueling switch engines which were regularly used indiscriminately in interstate and intrastate commerce. Such being the case, respondent was, we submit, at said time engaged in work in interstate commerce and his rights, if any, are controlled by the Federal Employers' Liability Act, and not the Workmen's Compensation Act of the State of Illinois.

As to this, the case of *Erie R. Co.* v. *Collins,* 253 U. S. 77, is directly in point. In that case the plaintiff, Collins, was hurt while starting a gasoline engine which pumped water into a tank which supplied water to both interstate and intrastate trains. It appeared that the plaintiff was not familiar with starting the engine and it exploded by reason of the fumes of the gasoline being ignited by a lantern or fire. In that case this Court held that the plaintiff, at the time of the happening of the injury, was engaged in interstate commerce.

There is no material difference between the facts in the *Collins case* and those in the case at bar. In the *Collins case* the injured man was starting the engine for the purpose of pumping water into a tank, which water was later to be used in watering engines used both in interstate and intrastate commerce, while in the case at bar, respondent was greasing the motor which he had started running for the purpose of hoisting coal into the chute, all of which coal was to be used in coaling engines engaged in both interstate and intrastate commerce.

In the course of its opinion, this Court stated, p. 85:

> "In the *Pedersen case* it was said that the questions which naturally arise: 'Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?' Or, as said in *Shanks* v. *Delaware, L. & W. R. Co., supra,* 'was the work so closely related to it (interstate commerce) as to be practically a part of it?' The answer must be in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes, therefore, within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as was demanded, and the test of the cases satisfied."

Particularly applicable to the facts in the case at bar, is the language and reasoning of the United State Circuit Court of Appeals in its opinion in the *Collins case, supra,* when that case was before it, 259 Fed., 172. In the course of its opinion, that court, after distinguishing the *Harrington case,* 241 U. S. 177, which was cited by the plaintiff, pointed out that the putting of coal in chutes from which it was to be taken by locomotives engaged in interstate and intrastate commerce, was work in interstate commerce, and stated as follows on page 175:

> "In unloading the coal into the chute, from which it was to be taken by the locomotives in interstate and intrastate commerce, it became converted into an instrumentality of interstate commerce. The act of putting the coal into the chutes from which the engines can take it is an act performed in interstate commerce, as much so as is the act of putting water into the trough by the side of the tracks to be scooped by passing engines; and we cannot distinguish the act of

> putting the coal into the coal chutes for the supply of the engines from the act of putting rails alongside of a track into which they are to be fitted or the bolts by the side of the bridge, as in the *Pedersen case.*"

The Court also stated as follows at the top of said page:

> "The water tank, the pump house, the pump, and the gasoline engine, used for the purpose of keeping the water tank supplied with water, were, under the circumstances, just as essential to the practical operation of the defendant's interstate commerce business as the tracks over which its trains were propelled."

The foregoing case is, it seems to us, directly in point and conclusive as to the case at bar. There are, however, a number of other cases in point to which we beg to call the Court's attention.

In *Rousch* v. *B. & O. R. R. Co.*, 243 Fed. 712, plaintiff, an employee of the defendant railroad company, while attempting to determine the depth of water in a cistern was injured by an explosion of gases which had accumulated therein. Said cistern was a part of a pumping station, which plaintiff operated, which supplied water indiscriminately to the locomotive engines of the defendant. The Court held that the plaintiff was engaged in interstate commerce at the time of his injury and said, pages 713, 715:

> "The solution of this inquiry depends on whether or not an employee engaged in operating a pumping station, which furnishes water to be used indiscriminately and contemporaneously for interstate and intrastate business, is within the Federal Employers' Liability Act. The test is whether the plaintiff, at the time of the accident, was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof. * * * (p. 713.)
>
> I am of opinion that the present case is within the rule of the *Pedersen case.* The pumping station was an instrumentality being used indiscriminately for interstate and intrastate commerce. The work being

performed by the plaintiff was so closely related to interstate transportation as to be practically a part of it. He was not engaged in original or independent work too remotely connected with interstate transportation to be said not to be practically a part thereof. It is true, his work also was necessary in carrying on intrastate transportation; but when the efforts of the employee at the time he was injured may relate to either class of transportation, then he is within the Act, and his right of action is controlled by it." (p. 715.)

In *Horton* v. *Oregon W. R. & N. Co.*, 130 Pac. (Wash.) 897, plaintiff's intestate was employed by the defendant railroad company as a pumper and he operated a plant for the purpose of supplying water to the company's locomotives. He lived some distance from the plant and the company furnished him with a handcar to go to and from his home, and while coming to work he was struck and killed by a train. The Court held that he was at the time engaged in the work of interstate commerce, and in the course of its opinion, said page 901:

"Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master, as well as the local trains, must have ceased altogether. * * * There can be no possible distinction in the relation to interstate commerce between the employment of the fireman who stokes the engine hauling the train so engaged and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too fine-spun and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. * * *"

In *Sells* v. *Grand Trunk Ry. Co.*, 206 Ill. App. 45, 51, plaintiff was in the employ of the defendant railroad company as a stationary engineer and was injured while repairing the hoisting device of a coal chute which was used for supplying defendant's engines with coal. The Court held that at the time of the happening of the injury plaintiff was engaged in work in interstate commerce, and in the course of its opinion said, page 51:

> "We think counsel for appellee were clearly correct in contending that switch engines engaged in breaking up trains conveying interstate commerce must be considered as also engaged therein. The business of plaintiff, therefore, was the operation of the instrumentality which actually loaded defendant's interstate commerce engines with fuel, and the evidence discloses that he was injured while repairing that instrumentality. In these circumstances it seems clear that the parties were engaged in interstate commerce within the rule laid down by the United States Supreme Court in *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556, that: 'The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?' In view of the facts in this case, the continued operation of the coal chute was necessary to the continuance of defendant's interstate traffic; the repair of the instrumentality was as much a part of interstate commerce as the repair of a bridge regularly used in interstate transportation. * * *"

The case of *Kelly* v. *Erie R. R. Co.*, 188 App. Div. 83, 177 N. Y. Supp. 278, 279, is also in point. In that case the pumping station was operated by a gasoline engine. The crankshaft of the engine being connected with the pumping machinery by a clutch. The clutch slipped and in attempting to repair it the plaintiff was injured. It pumped water into an elevated tank, from which all engines were indiscriminately supplied and water was also used for general purposes in connection with the railroad

station. On the authority of the *Collins case, supra,* it was held that the plaintiff was engaged in interstate commerce at the time of his injury.

Each one of the above cases is in point. In each one, the injured employee was engaged in operating or repairing appliances used either in pumping water into tanks or hoisting coal into chutes to be used indiscriminately in operating interstate and intrastate engines and in each of said cases, it was held that he was at the time engaged in work in interstate commerce.

Another case in point in principle is *Erie R. R. Co.* v. *Szary,* 253 U. S. 86. In that case an employee of a railroad engaged in both inter- and intrastate commerce whose duty it was to dry sand in stoves in a small structure near the tracks and supply it to the locomotives, whether operating in the one kind of commerce or the other, was injured while returning from an ash-pit whither he had gone to dump ashes taken by him from one of the stoves after sanding several locomotives. It was held that he was engaged in interstate commerce.

Under the rule laid down in the foregoing cases, there can, we submit, be no question but that respondent was at the time of his injury engaged in work in interstate commerce. Such being the case, he is not entitled to maintain this action, for his rights, if any, are controlled exclusively by the Federal Employers' Liability Act.

As to this, see *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170; *N. Y. Central R. R. Co.* v. *Winfield,* 244 U. S. 147; *Toledo, etc., & Western R. R. Co.* v. *Slavin,* 236 U. S. 454, and *So. Pac. Co.* v. *Industrial Accident Commission,* 251 U. S. 259.

The rule applicable is stated in the syllabus of *New York Central* v. *Winfield,* 244 U. S. 147, as follows:

> "The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in

interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act; and, Congress having thus fully covered the subject, no room exists for state regulation, even in respect of injuries occurring without fault, as to which the federal act provides no remedy."

Under the rule laid down in the foregoing cases, the Industrial Commission of Illinois was clearly without jurisdiction of the case, and had no power or authority to make an award of compensation against petitioner, and the Circuit Court of Cook County, Illinois, erred in not reversing and setting aside the decision and award of said Commission.

We, therefore, respectfully submit that the order and judgment of the Circuit Court of Cook County, Illinois, in this case confirming the decision of the Industrial Commission of Illinois should be reversed and that the proceedings and award of said Industrial Commission in said case should be quashed.

Edward U. Rawlins

Attorney for Petitioner.

.....

Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1930.

No. [redacted] 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,
Respondents.

Answer to Petition for Writ of Certiorari.

MORRIS K. LEVINSON, and
SAMUEL E. HIRSCH,
Counsel for Respondents.

CHICAGO LAW PRINTING CO., 101 S. WELLS ST. FRANKLIN 6521

INDEX.

Subject Index.

	PAGE
Statement	1
Brief	5
Argument	6

Table of Cases Cited.

C. B. & Q. R. R. Co. v. Harrington, 241 U. S. 177	5
Delaware R. R. Co. v. Yurkonis, 238 U. S. 439	5
Goldsmith v. Payne, 300 Ill. 119	5
Kelly v. Pennsylvania R. R. Co., 238 Fed. 95	5
Minneapolis and St. L. R. R. Co. v. Winters, 242 U. S. 353	5
Payne v. Industrial Co., 296 Ill. 223	5
Shanks v. Delaware R. R. Co., 239 U. S. 556	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1930.

No. 959

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS
and JOE THOMAS,
Respondents.

Answer to Petition for Writ of Certiorari.

STATEMENT.

MAY IT PLEASE THE COURT:

The statement of facts set out in petitioner's brief is so wholly incorrect, that we are constrained to submit the following:

Joe Thomas, the respondent and claimant below, is an illiterate colored man. He was a laborer whose duties consisted of hoisting coal, taking care of the coal chute, the roundhouse and cinder pit (Rec. 18), using the broom for cleaning up (Rec. 20), and to sweep and clean up the office (Rec. 36).

At the immediate time claimant got hurt, he was preparing to hoist coal from a bin down on the ground up into a coal chute near a roundhouse (Rec. 41). The coal evidently was lifted by means of a stationary electric motor. Thomas was oiling the motor and his arm became entangled in the gears (Rec. 14). Long after the coal got into the chute it would be dumped from overhead down into locomotive engines in the roundhouse.

When coal was later dumped into the locomotive engines, the engines were "dead," that is engines that had finished hauling freight cars and engines that were placed in the roundhouse at the end of their runs, for the purpose of being coaled and watered (Rec. 34).

Thus Thomas testifies at (Rec. 30), that the engines that he worked on are disconnected from the trains and have been pulled off the cars. At (Rec. 34), he testifies that the engines do not bring any freight into the roundhouse where he is working; that he has never seen any of these engines haul any freight (Rec. 29). At (Rec. 20) Thomas swears that "small" switch engines came into the roundhouse where he worked; that he would water and coal those engines once a day from 2:30 to 3:30 o'clock in the morning, after they came in from a run. From 3:30 to 6:00 o'clock A. M., they would go out on runs; that he had nothing to do with freight and that these particular little engines would only run around Chicago.

As to the one large engine, Thomas says that when it comes into the roundhouse, it has no freight (Rec. 31).

Thus also in the testimony of Lottinville (Rec. 47), a witness for the railroad company, it appears that the engines which are coaled by Thomas are dead engines. He says that when the switch engines come in, they are not bound for any purpose, except to be watered and coaled. And the witness refuses to say that those engines in the roundhouse are engines that run between different states of the Union (Rec. 48).

He also says (Rec. 49), that the engines, that come into the roundhouse, come in there light, that is, no freight at all, and when they go out, they have no freight and go out light also. These engines are designated as switch engines and only run a quarter of a mile and not over two miles and a quarter, except that one engine may run probably eleven miles. The witness for the railroad company makes it plain that as to engines classified for different industries, that the respective crews would coal their own engines. And (Rec. 53), the witness agrees with Thomas that the engines in the roundhouse are "dead" engines, after they are through with their runs.

A fair analysis of Thomas' testimony, as well as the testimony of the witnesses for the railroad company, makes it plain that he was a laborer, whose chief duties were to sweep up the roundhouse, and clean the office, and to put coal and water in four switch engines that were always dead when they were in the roundhouse. Necessarily, they had to be "dead," in the roundhouse, where Thomas operated his motor, because all the witnesses unite in saying that the roundhouse is no place for freight. The coaling operation, all the witnesses agree, took place at about 2:30 o'clock in the morning.

But it strikes us that all this testimony is immaterial, as the question is, not whether these engines might or might not later engage in interstate commerce, but had the work that claimant was doing at the time he got hurt any direct connection with interstate traffic. He was merely preparing to lift coal from a storage bin located near a roundhouse into a coal chute, at the time he was injured. Claimant swears that the coal later would be put into engines engaged in switching operations in and around Chicago. But when the coal would be put into the locomotive engines, they were "dead" engines. They might stand "dead" for days in the roundhouse.

Thomas never coaled engines that were in actual traffic nor had he anything to do with keeping engines running on the highway.

With respect to the citations presented by opposing counsel, it is enough to say that in each of those cases the workman was directly engaged in labor which furthered interstate commerce; that is to say, either on the tracks constituting an interstate highway or directly connected therewith. In the case at bar, it is evident that the work being done had nothing to do with the maintenance or operation of the interstate highway or interstate traffic and that the work was done in or near a roundhouse for the benefit of dead engines.

BRIEF.

I.

Respondent being engaged at the time of his injury, in hoisting coal in a roundhouse, from a bin to a coal chute, was not engaged in interstate commerce.

Shanks v. *Delaware R. R. Co.*, 239 U. S. 556.
Minneapolis and St. L. R. R. Co., v. *Winters*, 242 U. S. 353.
Delaware R. R. Co. v. *Yurkonis*, 238 U. S. 439.
C. B. & Q. R. R. Co. v. *Harrington*, 241 U. S. 177.
Kelly v. *Pennsylvania R. R. Co.*, 238 Fed. 95.

II.

The burden of proof is on the railroad company to prove that the employee was engaged in interstate commerce.

Payne v. *Industrial Com.*, 296 Ill. 223.
Goldsmith v. *Payne*, 300 Ill. 119.

ARGUMENT.

I.

We submit that an analysis of all the testimony in the record shows that Joe Thomas, the respondent, was not engaged in any such work, the immediate connection of which was to connect his work with interstate commerce.

A full exposition of the law, setting forth the distinction between such work as might be held closely connected with interstate commerce, and such as might not, is set forth in *Shanks* v. *Delaware R. R. Co.* 239 U. S. 556.

In that case a workman engaged in repairing or altering the location of a fixture in a machine shop, was injured. Says the Court at page 258 of the opinion:

> "The connection between the fixture and interstate transportation was remote, at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation."

So also in the case of *Erie R. R. Co.* v. *Collins*, 259 Fed. 172, at page 175, the Court says:

> "Coal 'ceases to be in such (interstate) commerce when it reaches its destination, and is left on the storage tracks for some time, as in the *Harrington* case.' (*Harrington* v. *C. B. & Q.*, 241 U. S. 177). 'Then the coal being out of interstate commerce does not again get into interstate commerce by the mere act of being moved from the storage tracks to another place on the tracks in front of the coal chutes. That was the act Harrington performed."

Again, in *Minneapolis and St. L. R. R. Co.* v. *Winters*, 242 U. S. 353, 356, the Court says:

> "An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. * * * It simply had finished some interstate work and had not yet begun upon any other. Its next work, so far as appears, might be interstate, or confined to Iowa, as it should happen. At the moment, it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities, or upon accidental later events."

We also wish to call the Court's attention to the cases of *Delaware R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *C. B. & Q. R. R. Co.* v. *Harrington*, 241 U. S. 177, and *Kelly* v. *Pennsylvania R. R. Co.*, 238 Fed. 95, which are illustrative of the distinction made by the Courts, and uphold claimant's contention herein, that he was not engaged in interstate commerce.

II.

It appears from the testimony of Lottinville, a witness for respondent Railroad Company, that there was only one engine in the roundhouse on the day that Thomas was injured and that it was a "dead" engine; that it had just laid off and was doing nothing. (Abst. 17; Rec. 78.)

Thomas says that at the time he got hurt, he was getting ready to hoist coal from a storage bin down on the ground up into the chute. (Abst. 9; Rec. 41.) No witness disputes that and no witness points out or can point out that that particular coal was later put into an engine that still later might or might not be engaged in interstate commerce. That is the state of the record and upon which opposing counsel say there cannot be the slightest question but that claimant was engaged in interstate commerce at the time he sustained his injury.

III.

It is also well settled that the burden of proof is on the railroad company to prove that its employee was engaged in interstate commerce. Petitioner has not only failed to sustain that burden, but, the evidence, in our opinion, is indubitably the other way.

Payne v. *Industrial Com.*, 292 Ill. 223.
Goldsmith v. *Payne*, 300 Ill. 119.

CONCLUSION.

The Supreme Court of Illinois, the Circuit Court of Cook County, Illinois, and the Industrial Commission, all having held that the respondent herein came within the purview of the Illinois Compensation Act, and, we submit, all the evidence showing that respondent was not engaged in interstate commerce, we respectfully submit that under Rule 38 of this Court the petition for certiorari herein should be denied.

Respectfully submitted,

MORRIS K. LEVINSON, and
SAMUEL E. HIRSCH,
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,
Respondents.

BRIEF AND ARGUMENT FOR RESPONDENTS.

MORRIS K. LEVINSON, and
SAMUEL E. HIRSCH,
Counsel for Respondents.

CHICAGO LAW PRINTING CO., 101 S. WELLS ST. FRANKLIN 6521

INDEX.

Subject Index.

Statement 1

Summary of points and authorities 4

I. Respondent being engaged at the time of his injury, in oiling a motor to be used for hoisting coal from a bin to a coal chute, was not engaged in interstate commerce 4

II. Unless the employe was actually engaged, at the time of the injury, in working with or using an instrumentality, which was then being used in interstate commerce, the Federal statute does not apply 4

III. The burden of proof is on the railroad company to prove that the employe was engaged in interstate commerce 4

Argument 5

Table of Cases Cited.

C. B. & Q. R. R. Co. v. Harrington, 241 U. S. 177 ..... 4, 5, 6

Delaware R. R. Co. v. Yurkonis, 238 U. S. 439 ..... 4, 7

Erie R. R. Co. v. Collins, 259 Fed. 172 5

Goldsmith v. Payne, 300 Ill. 119 ..... 4, 8

Kelly v. Pennsylvania R. R. Co., 238 Fed. 95 ..... 4, 7

Minneapolis and St. L. R. R. Co. v. Winters, 242 U. S. 353 ..... 4, 6

Payne v. Industrial Co., 296 Ill. 223 ..... 4, 8

Shanks v. Delaware R. R. Co., 239 U. S. 556 ..... 4, 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,
Respondents.

BRIEF AND ARGUMENT FOR RESPONDENTS.

STATEMENT.

The statement of facts set out in petitioner's brief is so wholly incorrect, that we are constrained to submit the following:

Joe Thomas, the respondent and claimant below, was an illiterate colored man, who was at the time of the injury in question a laborer employed by petitioner. His duties consisted of sweeping and cleaning up the office (Rec. 36), and part of the time he was engaged in running a motor which was used to lift coal from the ground into a coal chute near a roundhouse. (Rec. 18.)

At the immediate time claimant was hurt, he was preparing to hoist coal from a bin on the ground into a coal chute near the roundhouse in question. (Rec. 22.) The coal was lifted by means of a stationary electric motor. Claimant was oiling the motor, and his arm became entangled in the gears. (Rec. 14.) No coal had been lifted by him on the day he was hurt. He had merely started the motor when hurt.

The uncontradicted testimony is that long after the coal was lifted from the bin into the coal chute, the coal would be dumped into locomotive engines in the roundhouse, either by claimant or other employees of petitioner, but when such coal was dumped into the engines, the engines were "dead," that is engines that had finished switching freight cars and were in the roundhouse at the end of their respective runs.

Thus Thomas testified at (Rec. 34), that the engines that he worked on are disconnected from the trains and had been pulled off the cars. He testifies that the engines do not bring any freight into the roundhouse where he is working; that he has never seen any of these engines haul any freight. (Rec. 29.) At (Rec. 19, 20) Thomas swears that "small" switch engines came into the roundhouse where he worked; that he would water and coal these engines once a day from 2:30 to 3:30 o'clock in the morning, after they came in from a run. From 3.30 to 6 o'clock A. M., they would go out on runs; that he had nothing to do with freight and that these particular little engines would only run around Chicago and were switch engines and evidently not engaged in interstate hauls.

Thus also in the testimony of Lottinville (Rec. 47), a witness for the railroad company, it appears that the engines which are coaled by Thomas are "dead" engines.

He says that when the switch engines come in, they are not bound for any purpose, except to be watered and coaled. And the witness refuses to say that those engines in the roundhouse are engines that run between different states of the Union. (Rec. 48.) He also says (Rec. 49), that the engines, that come into the roundhouse, come in there "light," that is, no freight at all, and when they go out, they have no freight and go out "light" also. These engines are designated as switch engines and only run a quarter of a mile and not over two miles and a quarter, except that one engine may run probably eleven miles. The witness for the railroad company makes it plain that as to engines classified for different industries, that the respective crews would coal their own engines. And (Rec. 53), the witness agrees with Thomas that the engines in the roundhouse are "dead" engines, after they are through with their runs.

A fair analysis of Thomas' testimony, as well as the testimony of the witnesses for the railroad company, makes it plain that he was a laborer, whose chief duties were to sweep up the roundhouse, and clean the office, and to put coal and water in four switch engines that were always dead when they were in the roundhouse. Necessarily, they had to be "dead," in the roundhouse, where Thomas operated his motor, because all the witnesses unite in saying that the roundhouse is no place for freight. The coaling operation, all the witnesses agree, took place at about 2:30 o'clock in the morning.

No witness says that any of the switch engines in question actually crossed the Illinois state line, and all of the evidence is to the effect that the claimant never coaled engines that were in actual traffic or had he anything to do with keeping engines running on the interstate highway.

SUMMARY OF POINTS PRESENTED AND AUTHORITIES.

I.

Respondent being engaged at the time of his injury, in oiling a motor to be used for hoisting coal from a bin to a coal chute, was not engaged in interstate commerce.

Shanks v. *Delaware R. R. Co.*, 239 U. S. 556.
Minneapolis and St. L. R. R. Co. v. *Winters*, 242 U. S. 353.
Delaware R. R. Co. v. *Yurkonis*, 238 U. S. 439.
C. B. & Q. R. R. Co. v. *Harrington*, 241 U. S. 177.
Kelly v. *Pennsylvania R. R. Co.*, 238 Fed. 95.

II.

Unless the employe was actually engaged, at the time of the injury, in working with or using an instrumentality, which was then being used in interstate commerce, the Federal statute does not apply.

Shanks v. *Delaware R. R. Co.*, 239 U. S. 556.
Minneapolis and St. L. R. R. Co. v. *Winters*, 242 U. S. 353.
Delaware R. R. Co. v. *Yurkonis*, 238 U. S. 439.

III.

The burden of proof is on the railroad company to prove that the employe was engaged in interstate commerce.

Payne v. *Industrial Com.*, 296 Ill. 223.
Goldsmith v. *Payne*, 300 Ill. 119.

ARGUMENT.

I.

It is our contention under the evidence in this record, *firstly*, that inasmuch as the respondent was engaged in oiling a motor at the time he was injured, which motor was about to be used in the process of lifting coal from a bin to a chute, that such employe was not at said time engaged in interstate commerce, or in such work so closely related to it as to be practically a part thereof.

There is no dispute in the evidence that at the time of the injury, no coal had yet been lifted by the respondent from the ground to the chute. Respondent had started the motor and was endeavoring to oil the gears underneath the fixture when he was injured. (Rec. 22.)

Secondly, there is no evidence in the record as to how long the coal in question had been standing in the bin, before respondent started his motor in question in order to lift the same to the chute. For aught that appears from the record the coal may have been there for days, weeks or months.

In that connection the authorities cited by us under Points I and I are directly in point.

C. B. & Q. R. R. Co. v. *Harrington*, 241 U. S. 177.

In *Erie R. R. Co.* v. *Collins*, 259 Fed. 172, at page 175, the Court says:

> "Coal 'ceases to be in such (interstate) commerce when it reaches its destination, and is left on the stor-

age tracks for some time, as in the Harrington case.' (*Harrington* v. *C. B. & Q.*, 241 U. S. 177). 'Then the coal being out of interstate commerce does not again get into interstate commerce by the mere act of being moved from the storage tracks to another place on the tracks in front of the coal chutes. That was the act Harrington performed."

Again, in *Minneapolis and St. L. R. R. Co.* v. *Winters*, 242 U. S. 353, 356, the Court says:

"An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. * * * It simply had finished some interstate work and had not yet begun upon any other. Its next work, so far as appears, might be interstate, or confined to Iowa, as it should happen. At the moment, it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities, or upon accidental later events."

A full exposition of the law, setting forth the distinction between such work as might be held closely connected with interstate commerce, and such as might not, is set forth in *Shanks* v. *Delaware R. R. Co.*, 239 U. S. 556.

In that case a workman engaged in repairing or altering the location of a fixture in a machine shop, was injured. Says the Court at page 258 of the opinion:

"The connection between the fixture and interstate transportation was remote, at best, for the only function of the fixture was to communicate power to ma-

chinery used in repairing parts of engines some of which were used in such transportation."

See also:

Delaware R. R. Co. v. *Yurkonis,* 238 U. S. 439, and

Kelly v. *Pennsylvania R. R. Co.,* 238 Fed. 95.

II.

It appears from the testimony of Lottinville, a witness for respondent Railroad Company, that there was only one engine in the roundhouse on the day that Thomas was injured, and that it was a "dead" engine; that it had just laid off and was doing nothing. (Rec. 47.)

Thomas says that at the time he got hurt, he was getting ready to hoist coal from a storage bin down on the ground up into the chute. (Rec. 22.) No witness disputes that and no witness points out or can point out that that particular coal was later put into an engine that still later might or might not be engaged in interstate commerce. That is the state of the record and upon which opposing counsel say there cannot be the slightest question but that claimant was engaged in interstate commerce at the time he sustained his injury.

We believe the true rule to be deduced from the authorities, including the cases cited by opposing counsel, to be that to bring the employe within the interstate commerce rule, the employe at the time of the injury must have been actually engaged in furthering the work of the railroad along the interstate highway, or in work so closely connected therewith as to be practically a part thereof. Under the facts of this record, it appears to us, that that situation does not apply in the case at bar.

III.

It is also well setled that the burden of proof is on the railroad company to prove that its employe was engaged in interstate commerce. Petitioner has not only failed to sustain that burden, but, the evidence, in our opinion is indubitably the other way.

Payne v. *Industrial Com.*, 292 Ill. 223.
Goldsmith v. *Payne*, 300 Ill. 119.

CONCLUSION.

There is nothing in the evidence to show what operation was necessary to place the coal actually into the locomotive engine after it had been lifted into the coal chute. To extend the Federal Statute to a case like that at bar would be equivalent to saying that the person who put ink in the inkwell for the bookkeeper in the roundhouse was likewise governed by the provisions of the Federal Act, as well as the butcher who delivered meat to an engineer running an interstate train. In this record there is not even any proof on the part of the railroad company that the switch engine located in the roundhouse on the day claimant was hurt was allocated to interstate commerce, but it is a far cry from actually putting coal into an interstate engine to a situation like the present where the claimant was hurt while oiling a motor which had just been started by the claimant, which motor was later used to lift coal from a ground bin to a coal chute in a roundhouse.

For the foregoing reasons, we respectfully pray that the judgment of the Circuit Court of Cook County, Illinois, be affirmed.

Respectfully submitted,
MORRIS K. LEVINSON,
SAMUEL E. HIRSCH,
Counsel for Respondent.

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

[No. 35,881]

[No. 79]

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,
Respondents.

MOTION BY RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI HERETOFORE GRANTED.

MORRIS K. LEVINSON, and
SAMUEL E. HIRSCH,
Counsel for Respondents.

CHICAGO LAW PRINTING CO., 101 S. WELLS ST. FRANKLIN 6521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

(No. 35,881)

(No. 79)

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,
Respondents.

MOTION BY RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI HERETOFORE GRANTED.

Now comes the Industrial Commission of Illinois and Joe Thomas, respondents in the above entitled cause, by Morris K. Levinson and Samuel E. Hirsch, their counsel, and move that the writ of certiorari heretofore granted in the above entitled cause be dismissed or recalled for the reason that this Court is without jurisdiction to hear and determine the writ heretofore granted because the proceeding before the Illinois Industrial Commission, which was reviewed by the Circuit Court of Cook County, as provided by the statutes of the State of Illinois, did not constitute a case or controversy to which the judicial power of this Court extends, for although the award of the Industrial Commission of Illinois was reviewed by the Circuit Court of Cook County, in the State of Illinois, said Court merely was acting as a higher administrative body in such review.

BRIEF IN SUPPORT OF MOTION.

Under the Act in force in the State of Illinois, commonly known as the Workmen's Compensation Act, the Industrial Commission of Illinois is vested with the exclusive jurisdiction to determine applications for compensation for injuries sustained by certain classes of employes arising out of or while in the course of the employment, including the power to grant or deny compensation to the injured party according to the law and evidence in each case.

The Act, approved June 10, 1911, in force May 1, 1912, Cahill's Illinois Revised Statutes, 1931, pp. 1431, *et seq.* (Section 15) empowers the Commission to take the testimony of witnesses and to adopt necessary rules to govern its hearings.

Section 18 of the Act provides that all questions arising under the Act, if not settled by agreement of the parties interested therein, shall, except as otherwise provided, be determined by the Industrial Commission.

Section 19 provides that any disputed questions of law or fact shall be determined as provided in the Act. The board is given the power to appoint an Arbitrator or a Committee of Arbitrators in case a claim is made for partial or total disability; authorizes the Arbitrator or Committee of Arbitrators to make such inquiries and investigation as the committee shall deem necessary; provides for a hearing by the committee of arbitration near the place where the accident occurred; gives authority to the com-

mittee to find whether the injury complained of was temporary or permanent; provides for a report of the Arbitrators or committee of arbitration to be filed with the Industrial Commission; and that the report of the committee of arbitration shall be final unless the aggrieved party petitions the board for a review of the decision of the Arbitrators, and provides for a hearing on review of the decision of the committee of arbitration by the Industrial Commission; provides for a review of the Arbitrator by any member of the Commission or, upon request of the parties, by the full members of the Commission, or any other members of the Commission who have not heard the matter; gives the Commission, in its discretion, power to find specially upon any question of law or fact, provided a written demand for such review has been issued; provides that the decision of the Commission, acting within its powers, shall, in the absence of fraud, be conclusive unless a review is taken to the Circuit Court of the county where any of the parties defendant may be found by writ of certiorari to the Commission; provides that the Circuit Court shall, upon such review, have power to review all questions of law and fact, except that no additional evidence shall be heard in the Circuit Court, but gives the Circuit Court the power to set aside a decision if it is contrary to the manifest weight of the evidence; gives the Circuit Court power to confirm or set aside the decision of the Industrial Commission, and if the decision is set aside, gives the Circuit Court power to enter such decision as is justified by the statute, and also gives the Circuit Court power to remand the cause to the Industrial Commission for futher proceedings, and to give said Commission such instructions as the Circuit Court deems proper; provides for a review by the Supreme Court of Illinois, in its discretion, upon writ of error to the Cir-

cuit Court; provides for the enforcement of an award by the entry of a judgment in the Circuit Court under certain conditions, etc.

Under Section 19 of the Illinois Compensation Act the Circuit Court has the power of direction to substitute its own administrative judgment for that of the Industrial Commission, thereby not reviewing the acts of an administrative body to the extent limited by the common law writ of certiorari, namely: to see that the powers conferred under the statute have been exercised in the manner and form provided, but as an appellate administrative body which has the power to substitute its own administrative decision to that of the Commission; and where the Court is given the power to substitute its own judgment for that of a commission acting in an administrative capacity, it is clear that the reviewing court is performing an advisory and administrative function, and the mere fact that the body to whom this administrative review had been granted is called a court, does not make its functions judicial.

Keller v. *Potomac Power Co.*, 261 U. S. 428.
Prentis v. *Atlantic Coast Line*, 211 U. S. 210.

The case of *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464, decided May 19, 1930, holds that the Federal Radio Commission is an administrative body and that the Circuit Court of Appeals of the District of Columbia, in reviewing or revising its acts and decisions, is also acting as a reviewing administrative body, and not as a court, and that therefore the United States Supreme Court has no power or jurisdiction under the Constitution to review the decisions of the Court of Appeals of the District of Columbia when it is sitting in review of a decision of the Federal Radio Commission.

So, in the case at bar, we submit that the Circuit Court of Cook County, in reviewing the proceedings of the Indus-

trial Commission, in a given case, is not acting as a court, but is acting as a higher reviewing and administrative body, exercising purely administrative powers and not judicial functions. The Supreme Court of Illinois has held, in *Brewerton Coal Company* v. *Industrial Commission*, 324 Ill. Sup. page 89, at page 91, that the Industrial Commission is not a judicial body and performs no judicial functions, citing *Savoy Hotel Company* v. *Industrial Commission*, 279 Ill. 329, and this, in light of the fact that the decision of the Illinois Industrial Commission must be based on evidence and when not so based shall be set aside.

The Act of Congress creating the Radio Commission and providing for the appeal and review to the Court of Appeals of the District of Columbia similarly provides for the taking of evidence, the appointment of Examiners to take evidence and make reports thereon, the power of the Federal Radio Commission to review the testimony of its Examiners, the power of the Court of Appeals of the District of Columbia to review the evidence, in very much the same manner as does the Illinois statute creating the Industrial Commission for a review of its decisions. Hence, if the Industrial Commission of Illinois is not a judicial body and performs no judicial functions, the Circuit Court in determining whether or not the Industrial Commission has performed its administrative functions in manner provided by statute, is not sitting as a court, but merely is sitting as a superior revising administrative body.

Prior to the Act, the right of an employe to recovery was based upon the theory that the employer owed the employe a legal duty not to injure him by any wrongful or negligent act, and had violated that duty. A trial under the common law was of course a judicial controversy, involving the questions of fact and of law.

One of the purposes of the Workmen's Compensation Act was to remove from the field of judicial controversy cases involving injuries to employes where said Act had been accepted by the employer and employe. The effect of this was to commit to an administrative body the determination of two questions: One, whether under the facts in a given case the injury complained of arose out of or while in the course of the employment, and, second, if so, the amount of compensation to which the injured employe was entitled. Such a proceeding is therefore not a judicial proceeding, is not a determination of a controversy based upon a legal duty owed to an individual and a breach of such duty, and therefore is not a case or controversy arising under the judicial power of the State nor of the Federal Government, nor under the Constitution of the United States, nor under the Act of Congress, but merely is a determination of an administrative body; and the Circuit Court of Cook County, in reviewing the decision of that body, also is not determining any judicial case or controversy, but merely is reviewing and revising, as an appellate administrative body, a proceeding of an inferior administrative body.

Further, the writ of certiorari by which the Circuit Court is given power to review the award of the Industrial Commission, is wholly statutory and is not the exercise of the common law power to review on the common law judicial writ of certiorari.

Nierman v. *Industrial Commission*, 329 Ill. 623.

We, therefore, respectfully submit that the writ of certiorari heretofore granted be dismissed or recalled.

Morris K. Levinson, and

Samuel E. Hirsch,

Attorneys for Respondents.

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IN THE

Supreme Court of the United States

October Term, A. D. 1931

No. 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,

Respondents.

PETITION FOR REHEARING ON BEHALF OF PETITIONER CHICAGO & EASTERN ILLINOIS R. R. CO.

EDWARD W. RAWLINS,
Counsel for Petitioner.

T. P. LITTLEPAGE,
Of Counsel.

(35,881)

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

TABLE OF CASES.

	PAGE
C. B. & Q. R. R. Co. v. Harrington, 241 U. S. 177	6
Erie R. R. Co. v. Collins, 253 U. S. 77	2
Erie R. R. Co. v. Szary, 253 U. S. 86	2
Kinzell v. Chicago, M. & St. P. R. Co., 250 U. S. 130	3
New York Central R. Co. v. Porter, 249 U. S. 168	3
Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146	2
So. Pac. v. Industrial Accident Commission, 251 U. S. 259	4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1931

NO. 79.

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,
Respondents.

PETITION FOR REHEARING ON BEHALF OF PETITIONER CHICAGO & EASTERN ILLINOIS R. R. CO.

Comes now the above named petitioner, Chicago & Eastern Illinois R. R. Co., and presents this, its petition for a rehearing in this cause, said cause having been affirmed by this Honorable Court on January 4, 1932, and in support thereof respectfully shows the following reasons for granting a rehearing.

I.

In arriving at its decision in this case and in specifically overruling its former decisions in the Collins and Szary cases, we think this Court has overlooked the fact that in this particular class of cases it is the character of the instrumentality upon which an employee is working which is decisive in determining whether or not he was engaged in work in interstate transportation or so closely related thereto as to be a part thereof.

In its opinion in this case, the Court states as follows:

"From a reading of the opinion in the *Collins case*, it is apparent that the test of the *Shanks case* was not

followed (See p. 85). The words 'interstate commerce' being inadvertently substituted for the words 'interstate transportation.' "

Now we think that in the case at bar it is immaterial whether you apply the *"transportation" test or the "commerce"* test for the respondent, Thomas, was not, of course, actually engaged in the movement of traffic of any kind, but it is our theory that he was at the time engaged in caring for or operating an instrumentality essential to and so closely related to interstate transportation as to be a part thereof. What he was doing was operating or caring for a motor which furnished power for hoisting coal into a chute which for many years had been regularly and constantly used in applying coal to engines indiscriminately engaged in both inter and interstate transportation. This coal chute and its appliances were as necessary and essential to interstate transportation as were the tracks over which the engines in question operated, for without fuel the engines could not operate.

The *Collins* and *Szary cases* are not isolated cases in any sense but the rule laid down therein is one which beginning with *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146, decided in 1913, has consistently been followed by this Court in numerous cases.

As will be noted in the *Collins case*, this Court cites and follows the *Pedersen case*. In that case (Pedersen) the plaintiff was an iron worker employed by the defendant in the alteration and repair of some of its bridges and tracks, and at the immediate time of the injury was engaged in carrying some bolts or rivets from a toolcar to a bridge which they were intending to repair, which said bridge was being regularly used in both inter and intrastate commerce as was the coal chute in the case at bar. This Court held that at the time of his injury, the plaintiff, Pedersen, was engaged in interstate commerce. This on the theory

that he was engaged in and about the repair of an instrumentality of interstate commerce. In the course of its opinion the Court after referring to the intention of the statute, continues as follows, page 151:

> "But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * *
>
> True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

In *New York Central R. Co.* v. *Porter*, 249 U. S. 168, 63 Law Ed. 536, plaintiff's intestate, a section man, was killed as the result of being struck by a train while he was engaged in shoveling snow from the railroad tracks which were used for both inter and intrastate commerce. In that case, as in the *Collins case*, this Court followed the *Pedersen case* and held that he was at the time engaged in interstate commerce.

In *Kinzell* v. *Chicago, M. & St. P. R. Co.*, 250 U. S. 130, 63 Law Ed. 893, the claimant was injured while engaged in filling with earth a wooden trestle work bridge over which the railroad tracks ran. This Court again followed the *Pederson case* and held that he was at the time engaged in work in interstate commerce.

The *Pedersen, Kinzell* and *Porter cases, supra,* are again cited and followed in the case of *So. Pac.* v. *Industrial Accident Commission,* 251 U. S. 259, which we cited on page 14 of our brief herein but did not quote from.

In that case the plaintiff an electric lineman, was injured while wiping insulators supporting a cable through which an electric current was carried to the motors and cars engaged in both intra and interstate commerce. In that case this Court held that the plaintiff was at the time in question engaged in interstate commerce, and in its opinion stated as follows page 263:

> "Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body, they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation, and an essential part of it."

In none of the foregoing cases was the injured employee engaged in actual transportation at the time he was injured, but in each he was engaged in repairing, working on or operating some instrumentality which was closely connected with and essential to interstate transportation, and for that reason it was held in each of said cases that he was at the time engaged in interstate commerce.

In determining whether or not an instrumentality upon which an employee is working is or is not so closely related to transportation as to be a part thereof, it is we submit immaterial whether the "*transportation*" test or the "*commerce*" test is applied. The question simply is whether or not the instrumentality is essential to and so closely related to interstate transportation as to be a part thereof.

In this connection we call attention to the fact that in *So. Pac.* v. *Industrial Accident Commission,* 251 U. S. 259, *supra,* the Court in defining the test used the words "interstate transportation" while in the *Pedersen case* the Court used the words "interstate commerce," yet it reached the same conclusion in both cases.

As will be seen from the foregoing authorities, it is the character of the particular instrumentality upon which an employee is working which in this class of cases determines the question whether or not he is engaged in interstate transportation. If the instrumentality is one essential to and directly used in connection with interstate transportation as was the coal chute and motor in the case at bar, then, we submit, such employees are engaged in work so closely related to interstate transportation as to become a part thereof, and the case falls under the Federal Employers' Liability Act.

As above stated, beginning with the *Pedersen case* in 1913, the rule announced in the *Collins* and *Szary cases* has been consistently followed by this Court in numerous cases, and we believe that in discarding said rule and overruling said cases, this Court has overlooked the fact that in this particular class of cases it is the character of the instrumentality itself which controls and, therefore, has reached a wrong conclusion.

II.

The rule laid down in the Harrington Case, 241 U. S. 177, is not inconsistent with that laid down in the Collins and Szary cases.

In its opinion in this case, the Court states that it is unable to reconcile the decision in the *Harrington case* with the rule deducible from the *Collins* and *Szary cases.* Now while we discussed this particular question at length on the oral argument of this case, we beg to again suggest that we do not think that these decisions are inconsistent, or that adherence to the rule laid down in the *Harrington case* requires the overruling of the *Collins* and *Szary cases.*

In the *Collins* and *Szary cases,* as in the *Pedersen* and other cases cited *supra,* the injured employees were not engaged in train movements at all but were actually working on some instrumentality essential to and closely related to transportation. Whereas, in the *Harrington case,* the injured man was simply engaged in a switching movement. He was not caring for or operating a coal chute, or motor connected therewith, as was respondent in the case at bar, nor was he operating, caring for or working on any instrumentality but he was a switchman engaged in train work, and as to him, the question as to whether he was engaged in interstate commerce depends upon the particular kind of traffic he and his crew were handling at the time. An entirely different question would have been presented had he been actually working on some instrumentality as was respondent in the case at bar.

The *Collins* and *Szary cases* were decided by this Court subsequent to the time it decided the *Harrington case,* and in deciding those cases it had the *Harrington case* in mind for in the *Collins case* the *Harrington case* is referred to and discussed. The Court must have felt that the cases were distinguishable and that the rule announced in the

Harrington case was not applicable to the facts in the *Collins case.*

For the foregoing reasons, it is respectfully urged that the Court should grant a rehearing in this case, and that upon such rehearing the order affirming the judgment below should be vacated and that this case should be reversed upon the authority of *Erie R. R. Co.* v. *Collins,* 253 U. S. 97, and other similar cases.

EDWARD W. RAWLINS,
Counsel for Petitioner, Chicago & Eastern Illinois R. R. Co.

T. P. LITTLEPAGE,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, Edward W. Rawlins, counsel for the above named Chicago & Eastern Illinois R. R. Co., petitioner herein, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EDWARD W. RAWLINS,
Counsel for Petitioner, Chicago & Eastern Illinois R. R. Co.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 79.—October Term, 1931.

Chicago & Eastern Illinois R. R. Co., Petitioner, *vs.* Industrial Commission of Illinois and Joe Thomas. } On Writ of Certiorari to the Circuit Court of Cook County, State of Illinois.

[January 4, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

Thomas, an employee of the railroad company, in attempting to oil an electric motor while it was running, was injured by having his hand caught in the gears. The railroad was engaged in both intrastate and interstate commerce. The motor furnished power for hoisting coal into a chute, to be taken therefrom by, and for the use of, locomotive engines principally employed in the movement of interstate freight. An action was brought before the Industrial Commission of Illinois to recover compensation for the injury under the provisions of the Workmen's Compensation Act of Illinois.

The railroad company contended, and an arbitrator, appointed by the commission, found, that the work in which Thomas was engaged was in interstate commerce, that the case, therefore, was not within the state act and the commission was without jurisdiction. The commission, on review, held otherwise and awarded compensation aggregating $2,184.64. The court below affirmed the award upon a writ of certiorari authorized by state statute. The state supreme court, in the exercise of its discretion, declined to review the judgment; and the case is properly here on certiorari to the state circuit court. *Amer. Ry. Exp. Co.* v. *Levee*, 263 U. S. 19, 20; *West. Un. Tel. Co.* v. *Crovo*, 220 U. S. 364, 366.

The contention that Thomas was employed in interstate commerce at the time of the injury, rests upon the decisions of this court in *Erie R. R. Co.* v. *Collins*, 253 U. S. 77, and *Erie R. R. Co.* v. *Szary*, 253 U. S. 86. In the *Collins* case the employee, at the time of his injury, was operating a gasoline engine to pump water into a tank for the use of locomotives engaged in both interstate and intrastate commerce. In the *Szary* case the duty of the em-

ployee was to dry sand by the application of heat for the use of locomotives operating in both kinds of commerce; and he was so employed when injured. In each case this court held that the employee was engaged in interstate commerce at the time of the injury, within the terms of the Federal Employers' Liability Act.

The only difference between those cases and this one is that here the work of the employee related to coal, while in the *Collins* case it related to water, and in the *Szary* case, to sand. Obviously, the difference is not one of substance and if the *Collins* and *Szary* cases are followed ~~an affirmance~~ a reversal of the judgment below would result.

But in *Chi., Burlington & Q. R. R.* v. *Harrington*, 241 U. S. 177, the injured employee was engaged in taking coal from storage tracks to bins or chutes for the use of locomotives used in the movement of both interstate and intrastate traffic; and this court held that the service was not in interstate commerce. After quoting the test for determining whether an employee is engaged in interstate commerce, laid down in *Shanks* v. *Del., Lack. & Western R. R.*, 239 U. S. 556, 558, namely, "was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it," this court said (p. 180), "Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

We are unable to reconcile this decision with the rule deducible from the *Collins* and *Szary* cases, and it becomes our duty to determine which is authoritative. From a reading of the opinion in the *Collins* case, it is apparent that the test of the *Shanks* case was not followed (see p. 85), the words "interstate commerce" being inadvertently substituted for the words "interstate transportation." The *Szary* case is subject to the same criticism, since it simply followed the *Collins* case. Both cases are out of harmony with the general current of the decisions of this court since the *Shanks* case, *Chicago & North Western Ry. Co.* v. *Bolle*, — U. S. —, decided November 23, 1931, and they are now definitely overruled. The *Harrington* case furnishes the correct rule, and, applying it, the judgment below must be

Affirmed.